Nov 30 2-502 2nd Dairs

Argued

Affd

Jn. Strong

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~265.~~ 5 4

THE TOWN OF GENOA, PLAINTIFF IN ERROR,

vs.

JAMES O. WOODRUFF AND DANIEL MACAULEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 16, 1873.

2nd Point Supreme Court
15 Ent 475
Brief Point
1 Black 386
14 NY 356
50 NY 9
21 NY 490
Point
2 21 Ill 151
How 284 57 NY 616

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1 United States circuit court, northern district of New York.

Pleas before the judges of the circuit court of the United States of America for the northern district of New York, at the city of Albany, at the October term of said court held at said city on the second Tuesday of October, A. D. 1872.

Witness the honorable Lewis B. Woodruff, judge.

CHARLES MASON, *Clerk.*

NORTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, at the October term of said circuit court, A. D. 1872, to wit, the 14th day of January, A. D. 1873, came James O. Woodruff and Daniel Macauley, by David Wright, their attorney, and brought into said court their certain declaration or complaint against the town of Genoa; which said declaration or com-
2 plaint was and is in the words and figures following, to wit:

3 United States circuit court, northern district of New York, of the term of October, to wit, the 14th day of January, 1873, as yet of the term of October, 1872.

JAMES O. WOODRUFF AND DANIEL MACAULEY }
vs.
THE TOWN OF GENOA. }

NORTHERN DISTRICT OF NEW YORK, *ss:*

James O. Woodruff & Daniel Macauley, plaintiff' in this action, by David Wright, their attorney, bring this, their action, against the town of Genoa, defendant, and by this, their complaint, say and show to the court here—

That they, the said plaintiffs, are not citizens or residents of the State of New York, but that they are citizens of the State of Indiana, and residents of Indianapolis in said State of Indiana.

That the defendant, the said town of Genoa, is one of the towns of the county of Cayuga in said State of New York, and within the northern district of New York.

That said defendant is a municipal corporation for certain purposes, and amongst others of suing and being sued upon contracts. And for a first count, or cause of action, the said plaintiffs say and aver—

That heretofore, to wit, on the 16th day of April, 1852, an act was duly passed by the legislature of the State of New York entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie, or Cayuga and Susquehannah Railroad," whereby it was, amongst other things, enacted that it should be lawful for the supervisor of any town in the said county of Cayuga, and the assessors of such town, in said county, who were appointed by said act as commissioners to act in conjunction with said supervisor in effecting and executing the purposes of said act, to borrow, on the faith and credit of said town, such sum of money as they, said supervisor and assessors, might deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as might be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signature, a bond or bonds, on which the interest should be made payable annually, or semi-annually, during

the term said money might be borrowed, and the principal and interest of which loan should be made payable in such sums, and at such times and place as should be agreed upon and expressed in the bonds duly executed under the authority of said act.

And wherein and whereby it was further enacted that said assessors appointed to act as commissioners, by section first of said act, should hold their office till the next annual town meeting of their town, when it should be the duty of the electors of said town to elect by ballot, in the same manner that town officers were then elected, two commissioners, to be called "railroad commissioners," to act in conjunction with the supervisor in carrying into effect the provisions of said act, and that the action of a majority of such supervisor and commissioners should at all times be sufficient for carrying into effect the provisions of said act.

That it was in said act further provided that the said supervisor and commissioners should have no power to do any of the acts authorized by said act, until a railroad company had been duly organized according to the requirements of the general railroad law for the purpose of constructing the aforesaid described railroad, to wit, a railroad passing through the city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga Railroad, or the New York and Erie Railroad, and until the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprise two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

That a railroad company, to wit, the Lake Ontario, Auburn and New York Railroad Company, was duly organized, to wit, on the 23d day of August, 1852, according to the provisions of the general railroad law of the State of New York, passed April 2d, 1850, for constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, commencing at some point on the Susquehannah and Cayuga Railroad, to wit, about seven miles from the village of Ithaca, in the county of Tompkins and State of New York, and extending thence to the city of Auburn, and thence to the termination of said railroad at Little Sodus Bay, in the town of Sterling, Cayuga County.

That the written assent of two-thirds of the resident persons taxed in said town of Genoa, as appeared on the assessment-roll of said town of Genoa made next previous to the time of borrowing the money authorized by said act, had been obtained in pursuance of said act, and filed in clerk's office of Cayuga County, together with the affidavit required by said act attached to said written assents and statement, to the effect that the persons whose written assents were thereto attached and filed as aforesaid comprised two-thirds of all the resident tax-payers of said town of Genoa on its assessment-roll next previous to the obtaining said written assents, before the execution and delivery of any bonds by said supervisor and commissioners of said town of Genoa.

4 That afterwards, to wit, on the 26th day of February, 1853, John King, who was then supervisor of said town of Genoa, and Allen Palmer, and Amos Hur'burt, who were then the railroad commissioners of said town of Genoa, theretofore duly elected by the electors

of said town of Genoa, according to said act, and by virtue thereof, under their several signatures, duly executed a certain writing obligatory, or bond of said town, bearing date the said 26 day of February, 1853, and numbered four in the series of bonds executed under and in virtue of said act, whereby the said town of Genoa, in pursuance of said act of the legislature of the State of New York, acknowledged itself to owe, and promised to pay to the bearer of said bond No. 4, the sum of one thousand dollars, with interest at the rate of seven per cent. per annum, payable semi-annually on the first day of January and July in each year, on surrender of the coupons to said bond attached, at the Bank of the State of New York, in the city of New York, the principal to be re-imbursed at the same place, at the expiration of twenty years from the first day of January, 1853.

That the said John King, & Allen Palmer, & Amos Hurlburt, as such supervisor and railroad commissioners as aforesaid, and under their official signatures, at the same time of the execution of said bond by them, as aforesaid, to wit, on the said second day of March, 1853, duly attached to said bond No 4 thirty-nine several coupons, or promises to pay, the semi-annual interest of thirty-five dollars each, which would become due and payable, upon the expiration of each and every six months from and after the first day of January, one thousand eight hundred and fifty-four, until the first day of January, one thousand eight hundred and seventy-three, each and every of which coupons was substantially in the following form, except the time of payment therein specified, to wit:

"$35. The town of Genoa, in the county of Cayuga, hereby acknowledges that there will be due the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York, on the first day of , being interest due on that day on bond No. 4."

That afterwards, and before said bond No. 4 was negotiated or delivered by said town of Genoa to any person, to wit, on the 22d day of August, 1853, the then clerk of said county of Cayuga, at the request of the said town of Genoa, made and endorsed upon bond No. 4 his certificate in writing, duly signed by him in his official character as such clerk of said county of Cayuga, whereby he, the said clerk, under his said official signature, certified that a paper purporting to be the written assent of two-thirds of the resident tay-payers of said town of Genoa, with the affidavit required by section one of the act referred to by its title in said bond, had been filed in said clerk's office.

That the said supervisor and railroad commissioners, and acting as such, afterwards and after the execution of said bond and coupons as aforesaid, and after the organization of said railroad company as aforesaid, and after the written assent of two-thirds of the resident persons taxed in said town of Venice had been obtained and filed as aforesaid, together with the affidavit required by section one of said act, to wit, on the first day of January, 1854, at the said town of Genoa, borrowed, on the faith and credit of said town of Genoa, of Ashbel Avery the sum of one thousand dollars, for the purpose and in accordance with the provisions and in virtue of said act of said legislature, and to secure the payment thereof with interest thereon, at the rate of seven per cent. per annum, from the time of such borrowing, delivered the said bond No. 4, with the coupons hereinbefore mentioned, thereto attached, and the said certificate of the clerk of the county of Cayuga hereinbefore mentioned thereon endorsed, to him, the said Ashbel Avery, the lender of said money, who thereby, then and there, became and was the owner, holder, and bearer thereof.

That afterwards, to wit, on the first day of January, 1857, at the city

of Indianapolis, in said State of Indiana, they, the said plaintiffs, for a valuable consideration then paid by them therefor, purchased and became, and have ever since continued to be, and now are the owners, holders, and bearers of said bond No. 4, together with the said coupons thereto attached, all of which then remained unpaid. And the said bond No. 4, with the said coupons attached, was thereupon then and there delivered to them, the said plaintiffs, and the same has ever since continued and remained, and still remains in their possession as such owners, holders, and bearers thereof, and they, the said plaintiffs, thereby became, and were, and still are, entitled to demand, have, and receive the moneys due and remaining unpaid thereon, and also the moneys thereafter to become due and payable thereon, when, and as the same should thereafter become due and payable, according to the terms and conditions thereof.

And the said plaintiffs aver that the said town of Genoa had not, at the time the moneys mentioned in said bond and in said several coupons became due and payable, nor has said town of Genoa at any time since, had, at the said The Bank of the State of New York, in the said city of New York, or elsewhere, any money or means, whereby the said several sums acknowledged by said town of Genoa to be due, could be, or would have been, paid, had a demand thereof been made when the same became due and payable, as provided in and by the terms of said bond, and of said several coupons, nor at any time since, and although often requested so to do, the said town of Genoa has hitherto wholly refused, and still does refuse, to pay the said several sums in said coupons and said bond specified, and being the principal and interest which accrued upon said bond from the first day of January, 1854, to the first day of January, 1873, and which became due and payable to the owner of said bond and said coupons on said several days, in that behalf hereinbefore specified. And said plaintiffs further aver that the whole of the said principal sum of one thousand dollars, together with the interest thereon from the first day of January, 1855, and the interest upon the several sums so as aforesaid mentioned in said several coupons, from the time the same severally became due and payable, still remain due and unpaid, and said defendant, although often requested so to do, has hitherto wholly refused, and still does refuse, to pay the same, or any part thereof, to them, the said plaintiffs.

5 Second. And for a further and second cause of action, the said plaintiffs further say and aver—

That heretofore, to wit, on the 16th day of April, 1852, an act was duly passed by the legislature of the State of New York, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie, or Cayuga and Susquehannah Railroad," whereby it was, amongst other things, enacted that it should be lawful for the supervisor of any town in the said county of Cayuga, and the assessors of such town, in said county, who were appointed by said act as commissioners to act in conjunction with said supervisor in effecting and executing the purposes of said act, to borrow, on the faith and credit of said town, such sum of money as they, said supervisor and assessors, might deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as might be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signature, a bond or bonds, on which the interest should be made payable annually, or semi-annually, during the term said money might be borrowed, and

the principal and interest of which loan should be made payable in such sums and at such times and place as should be agreed upon and expressed in the bonds duly executed under the authority of said act.

And wherein and whereby it was further enacted that said assessors, appointed to act as commissioners by section first of said act, should hold their office till the next annual town meeting of their town, when it should be the duty of the electors of said town to elect by ballot, in the same manner that town officers were then elected, two commissioners, to be called "railroad commissioners," to act in conjunction with the supervisor in carrying into effect the provisions of said act, and that the action of a majority of such supervisor and commissioners should, at all times, be sufficient for carrying into effect the provisions of said act.

That it was in said act further provided that the said supervisor and commissioners should have no power to do any of the acts authorized by said act until a railroad company had been duly organized according to the requirements of the general railroad law, for the purpose of constructing the aforesaid described railroad, to wit, a railroad passing through the city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga Railroad, or the New York and Erie Railroad, and until the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprise two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

That a railroad company, to wit, the Lake Ontario, Auburn and New York Railroad Company, was duly organized, to wit, on the 23d day of August, 1852, according to the provisions of the general railroad law of the State of New York, passed April 2d, 1850, for constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, commencing at some point on the Susquehannah and Cayuga Railroad, to wit, about seven miles from the village of Ithaca, in the county of Tompkins and State of New York, and extending thence to the city of Auburn, and thence to the termination of said railroad at Little Sodus Bay, in the town of Sterling, Cayuga County.

That the written assent of two-thirds of the resident persons taxed in said town of Genoa, as appeared on the assessment-roll of said town of Genoa made next previous to the time of borrowing the money authorized by said act, had been obtained in pursuance of said act, and filed in clerk's office of Cayuga County, together with the affidavit required by said act attached to said written assents and statement, to the effect that the persons whose written assents were thereto attached and filed as aforesaid comprise two-thirds of all the resident tax-payers of said town of Genoa on its assessment-roll next previous to the obtaining said written assents, before the execution and delivery of any bonds by said supervisor and commissioners of said town of Genoa.

That afterwards, to wit, on the 26th day of February, 1853, John King, who was then supervisor of said town of Genoa, and Allen Palmer and Amos Hurlburt, who were then the railroad commissioners of said town of Genoa, theretofore duly elected by the electors of said town of

Genoa according to said act, and by virtue thereof, under their several signatures, duly executed a certain writing obligatory, or bond of said town, bearing date the said 26th day of February, 1853, and numbered ten in the series of bonds executed under and in virtue of said act, whereby the said town of Genoa, in pursuance of said act of the legislature of the State of New York, acknowledged itself to owe, and promised to pay to the bearer of said bond No. 10, the sum of one thousand dollars, with interest at the rate of seven per cent. per annum, payable semi-annually on the first day of January and July in each year, on surrender of the coupons to said bond attached, at the Bank of the State of New York, in the city of New York, the principal to be re-imbursed at the same place, at the expiration of twenty years from the first day of January, 1853.

That the said John King and Allen Palmer and Amos Hurlburt, as such supervisor and railroad commissioners as aforesaid, and under their official signatures, at the same time of the execution of said bond by them as aforesaid, to wit, on the said second day of March, 1853, duly attached to said bond No. 10 thirty-nine several coupons, or promises to pay the semi-annual interest of thirty-five dollars each, which would become due and payable upon the expiration of each and every six months from and after the first day of January, one thousand
6 eight hundred and fifty-four, until the first day of January, one thousand eight hundred and seventy three, each and every of which coupons was substantially in the following form, except the time of payment therein specified, to wit:

"$35. The town of Genoa, in the county of Cayuga, hereby acknowledges that there will be due the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York on the first day of , being interest due on that day on bond No. 10."

That afterwards, and before said bond No. 10 was negotiated or delivered by said town of Genoa to any person, to wit, on the 22d day of August, 1853, the then clerk of said county of Cayuga, at the request of the said town of Genoa, made and endorsed upon bond No. 10 his certificate in writing, duly signed by him in his official character as such clerk of said county of Cayuga, whereby he, the said clerk, under his said official signature, certified that a paper purporting to be the written assent of two-thirds of the resident tax-payers of said town of Genoa, with the affidavit required by section one of the act referred to by its title in said bond, had been filed in said clerk's office.

That the said supervisor and railroad commissioners, and acting as such, afterwards, and after the execution of said bond and coupons as aforesaid, and after the organization of said railroad company as aforesaid, and after the written assent of two-thirds of the resident persons taxed in said town of Venice had been obtained and filed as aforesaid, together with the affidavit required by section one of said act, to wit, on the first day of January, 1854, at the said town of Genoa, borrowed, on the faith and credit of said town, of Ashbel Avery, the sum of one thousand dollars, for the purpose and in accordance with the provisions, and in virtue of said act of said legislature, and to secure the payment thereof, with interest thereon at the rate of seven per cent. per annum from the time of such borrowing, delivered the said bond No. 10, with the coupons hereinbefore mentioned thereto attached, and the said certificate of the clerk of the county of Cayuga hereinbefore mentioned thereon endorsed, to him, the said Ashbell Avery, the lender of said money, who thereby, then and there, became and was the owner, holder, and bearer thereof.

That afterwards, to wit, on the first day of January, at Indianapolis, in the said State of Indiana, they, the said plaintiffs, for a valuable consideration then paid by them therefor, purchased and became, and have ever since continued to be, and now are, the owners, holders, and bearers of said bond No. 10, together with the said coupons thereto attached, all of which then remained unpaid. And the said bond No. 10, with the said coupons attached, was thereupon then and there delivered to them, the said plaintiffs, and the same has ever since continued and remained, and still remains, in their possession as such owners, holders, and bearers thereof, and they, the said plaintiffs, thereby became and were, and still are, entitled to demand, have, and receive the monies due and remaining unpaid thereon, and also the monies thereafter to become due and payable thereon, when and as the same should thereafter become due and payable, according to the terms and conditions there'f.

And the said plaintiffs aver that the said town of Genoa had not, at the time the moneys mentioned in said bond and in said several coupons became due and payable, nor has said town of Genoa at any time since had, at the said the Bank of the State of New York, in the said city of New York, or elsewhere, any money or means whereby the said several sums acknowledged by said town of Genoa to be due could be, or would have been, paid, had a demand thereof been made when the same became due and payable, as provided in and by the terms of said bond and of said several coupons, nor at any time since, and although often requested so to do, the said town of Genoa has hitherto wholly refused, and still does refuse, to pay the said several sums in said coupons and said bond specified, and being the principal and interest which accrued upon said bond from the first day of January, 1854, to the first day of January, 1873, and which became due and payable to the owner of said bond and said coupons on said several days in that behalf hereinbefore specified. And said plaintiffs further aver, that the whole of the said principal sum of one thousand dollars, together with the interest thereon from the first day of January, 1855, and the interest upon the several sums so as aforesaid mentioned in said several coupons, from the time the same severally became due and payable, still remain due and unpaid, and said defendant, although often requested so to do, has hitherto wholly refused, and still does refuse, to pay the same, or any part thereof, to them, the said plaintiffs.

7 Third. And for a further and third cause of action the said plaintiffs further say and aver—

That heretofore, to wit, on the 16th day of April, 1852, an act was duly passed by the legislature of the State of New York, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehannah Railroad," whereby it was, amongst other things, enacted that it should be lawful for the supervisor of any town in the said county of Cayuga, and the assessors of such town, in said county, who were appointed by said act as commissioners to act in conjunction with said supervisor in effecting and executing the purposes of said act, to borrow, on the faith and credit of said town, such sum of money as they, said supervisor and assessors, might deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as might be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds, on which the interest should be made payable annually, or semi-annually,

during the term said money might be borrowed, and the principal and interest of which loan should be made payable in such sums and at such times and place as should be agreed upon and expressed in the bonds duly executed under the authority of said act.

And wherein and whereby it was further enacted that said assessors, appointed to act as commissioners by section first of said act, should hold their office till the next annual town meeting of their town, when it should be the duty of the electors of said town to elect by ballot, in the same manner that town-officers were then elected, two commissioners, to be called "railroad commissioners," to act in conjunction with the supervisor in carrying into effect the provisions of said act, and that the action of a majority of such supervisor and commissioners should at all times be sufficient for carrying into effect the provisions of said act.

That it was in said act further provided that the said supervisor and commissioners should have no power to do any of the acts authorized by said said act until a railroad company had been duly organized, according to the requirements of the general railroad-law, for the purpose of constructing the aforesaid-described railroad, to wit, a railroad passing through the city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga Railroad, or the New York and Erie Railroad, and until the written assent of two-thirds of the resident persons taxed in said town, as appearing on the asssessment-roll of such town made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprise two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

That a railroad company, to wit, the Lake Ontario, Auburn and New York Railroad Company, was duly organized, to wit, on the 23d day of August, 1852, according to the provisions of the general railroad-law of the State of New York, passed April 2d, 1850, for constructing, maintaining, and operating a railroad for public use in the conveyance of persons and property, commencing at some point on the Susquehannah and Cayuga Railroad, to wit, about seven miles from the village of Ithaca, in the county of Tompkins, and State of New York, and extending thence to the city of Auburn, and thence to the termination of said railroad at Little Sodus Bay, in the town of Sterling, Cayuga County.

That the written assent of two-thirds of the resident persons taxed in said town of Genoa, as appeared on the assessment-roll of said town of Genoa made next previous to the time of borrowing the money authorized by said act, had been obtained in pursuance of said act, and filed in clerk's office of Cayuga County, together with the affidavit required by said act attached to said written assents and statement, to the effect that the persons whose written assents were thereto attached and filed as aforesaid comprised two-thirds of all the resident tax-payers of said town of Genoa on its assessment-roll next previous to the obtaining said written assents, before the execution and delivery of any bonds by said supervisor and commissioners of said town of Genoa.

That afterwards, to wit, on the 26th day of February, 1853, John King, who was then supervisor of said town of Genoa, and Allen Palmer and Amos Hurlburt, who were then the railroad commissioners of said town of Genoa, theretofore duly elected by the electors of said town of Genoa according to said act, and by virtue thereof, under their several

signatures, duly executed a certain writing obligatory, or bond of said town, bearing date the said 26th day of February, 1853, and numbered eleven, in the series of bonds executed under and in virtue of said act, whereby the said town of Genoa, in pursuance of said act of the legislature of the State of New York, acknowledged itself to owe, and promised to pay to, the bearer of said bond No. 11 the sum of one thousand dollars, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first day of January and July in each year, on surrender of the coupons to said bond attached, at the Bank of the State of New York, in the city of New York, the principal to be re-imbursed at the same place at the expiration of twenty years from the first day of January, 1853.

That the said John King and Allen Palmer and Amos Hurlburt, as such supervisor and railroad commissioners as aforesaid, and under their official signatures, at the same time of the execution of said bond by them as aforesaid, to wit, on the said second day of March, 1853, duly attached to said bond No. 11 thirty-nine several coupons, or promises to pay the semi-annual interest of thirty-five dollars each, which would become due and payable upon the expiration of each and every six months from and after the first day of January, one thousand eight hun-
8 dred and fifty-four, until the first day of January, one thousand eight hundred and seventy-three, each and every of which coupons was substantially in the following form, except the time of payment therein specified, to wit:

"$35. The town of Genoa, in the county of Cayuga, hereby acknowledges that there will be due the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York, on the first day of , being interest due on that day on bond No. 11."

That afterwards, and before said bond No. 11 was negotiated or delivered by said town of Genoa to any person, to wit, on the 22d day of August, 1853, the then clerk of said county of Cayuga, at the request of the said town of Genoa, made and endorsed upon bond No. 11 his certificate in writing, duly signed by him in his official character as such clerk of said county of Cayuga, whereby he, the said clerk, under his said official signature, certified that a paper purporting to be the written assent of two-thirds of the resident tax-payers of said town of Genoa, with the affidavit required by section one of the act referred to by its title in said bond, had been filed in said clerk's office.

That the supervisor and railroad commissioners, and acting as such, afterwards, and after the execution of said bond and coupons as aforesaid, and after the organization of said railroad company as aforesaid, and after the written assent of two-thirds of the resident persons taxed in said town of Venice had been obtained and filed as aforesaid, together with the affidavit required by section one of said act, to wit, on the first day of January, 1854, at the said town of Genoa, borrowed, on the faith and credit of said town, of Ashbel Avery, the sum of one thousand dollars, for the purpose and in accordance with the provisions and in virtue of said act of said legislature, and to secure the payment thereof, with interest thereon at the rate of seven per cent. per annum from the time of such borrowing, delivered the said bond No. 11, with the coupons hereinbefore mentioned thereto attached, and the said certificate of the clerk of the county of Cayuga hereinbefore mentioned thereon endorsed, to him, the said Ashbel Avery, the lender of said money, who thereby, then and there, became and was the owner, holder, and bearer thereof.

That afterwards, to wit, on the first day of January, 1857, at Indianapolis, in said State of Indiana, they, the said plaintiffs, for a valu-

able consideration then paid by them therefor, purchased and became, and has ever since continued to be, and now are, the owner, holder, and bearer of said bond No. 11, together with the said coupons thereto attached, all of which then remained unpaid. And the said bond No. 11, with the said coupons attached, was thereupon then and there delivered to them, the said plaintiffs, and the same has ever since continued and remained, and still remains, in the'r possession as such owners, holders, and bearers thereof; and they, the said plaintiffs, thereby became, and were, and still are, entitled to demand, have, and receive the monies due and remaining unpaid thereon, and also the monies thereafter to become due and payable thereon, when, and as the same should thereafter become due and payable, according to the terms and conditions thereof.

And the said plaintiffs aver that the said town of Genoa had not, at the time the moneys mentioned in said bond and in said several coupons became due and payable, nor has said town of Genoa at any time since, had, at the said The Bank of the State of New York, in the said city of New York, or elsewhere, any money or means whereby the said several sums acknowledged by said town of Genoa to be due could be, or would have been, paid, had a demand thereof been made when the same became due and payable, as provided in and by the terms of said bond, and of said several coupons, nor at any time since; and although often requested so to do, the said town of Genoa has hitherto wholly refused, and still does refuse, to pay the said several sums in said coupons and said bond specified, and being the principal and interest which accrued upon said bond from the first day of January, 1854, to the first day of January, 1873, and which became due and payable to the owner of said bond and said coupons on said several days in that behalf hereinbefore specified. And said plaintiffs fu'ther aver that the whole of the said principal sum of one thousand dollars, together with the interest thereon from the first day of January, 1855, and the interest upon the several sums so as aforesaid mentioned in said several coupons, from the time the same severally became due and payable, still remain due and unpaid; and said defendant, although often requested so to do, has hitherto wholly refused, and still does refuse, to pay the same, or any part there'f, to them, the said plaintiffs.

9 Fourth. And, for a further and fourth cause of action, the said plaintiffs say and aver—

That heretofore, to wit, on the 16th day of April, 1852, an act was duly passed by the legislature of the State of New York, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie, or Cayuga and Susquehannah Railroad," whereby it was, amongst other things, enacted that it should be lawful for the supervisor of any town in the said county of Cayuga, and the assessors of such town, in said county, who were appointed by said act as commissioners to act in conjunction with said supervisor in effecting and executing the purposes of said act, to borrow, on the faith and credit of said town, such sum of money as they, said supervisor and assessors, might deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as might be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds, on which the interest should be made payable annually or semi-annually, during the term said money might be borrowed, and the principal and interest of which loan should be made payable in such sums, and at

such times and place, as should be agreed upon and expressed in the bonds duly executed under the authority of said act.

And wherein and whereby it was further enacted that said assessors, appointed to act as commissioners by section first of said act, should hold their office till the next annual town-meeting of their town, when it should be the duty of the electors of said town to elect by ballot, in the same manner that town officers were then elected, two commissioners, to be called "railroad commissioners," to act in conjunction with the supervisor in carrying into effect the provisions of said act, and that the action of a majority of such supervisor and commissioners should, at all times, be sufficient for carrying into effect the provisions of said act.

That it was in said act further provided that the said supervisor and commissioners should have no power to do any of the acts authorized by said act until a railroad company had been duly organized, according to the requirements of the general railroad law, for the purpose of constructing the aforesaid-described railroad, to wit, a railroad passing through the city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga Railroad, or the New York and Erie Railroad, and until the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprise two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

That a railroad company, to wit, the Lake Ontario, Auburn and New York Railroad Company, was duly organized, to wit, on the 23d day of August, 1852, according to the provisions of the general railroad law of the State of New York, passed April 2d, 1850, for constructing, maintaining, and operating a railroad for public use, in the conveyance of persons and property, commencing at some point on the Susquehannah and Cayuga Railroad, to wit, about seven miles from the village of Ithaca, in the county of Tompkins and State of New York, and extending thence to the city of Auburn, and thence to the termination of said railroad at Little Sodus Bay, in the town of Sterling, Cayuga County.

That the written assent of two-thirds of the resident persons taxed in said town of Genoa as appeared on the assessment-roll of said town of Genoa made next previous to the time of borrowing the money authorized by said act, had been obtained in pursuance of said act, and filed in clerk's office of Cayuga County, together with the affidavit required by said act attached to said written assents and statement, to the effect that the persons whose written assents were thereto attached and filed as aforesaid, comprised two-thirds of all the resident tax-payers of said town of Genoa on its assessment-roll next previous to the obtaining said written assents, before the execution and delivery of any bonds by said supervisor and commissioners of said town of Genoa.

That afterwards, to wit, on the 26th day of February, 1853, John King, who was then supervisor of said town of Genoa, and Allen Palmer and Amos Hurlburt, who were then the railroad commissioners of said town of Genoa, theretofore duly elected by the electors of said town of Genoa, according to said act, and by virtue thereof, under their several signatures, duly executed a certain writing obligatory, or bond of said

town, bearing date the said 26th day of February, 1853, and numbered twelve in the series of bonds executed under and in virtue of said act, whereby the said town of Genoa, in pursuance of said act of the legislature of the State of New York, acknowledged itself to owe, and promised to pay to the bearer of said bond No. 12, the sum of one thousand dollars, with interest at the rate of seven per cent. per annum, payable semi-annually on the first day of January and July in each year, on surrender of the coupons to said bond attached, at the Bank of the State of New York, in the city of New York, the principal to be re-imbursed at the same place, at the expiration of twenty years from the 1st day of January, 1853.

That the said John King and Allen Palmer & Amos Hur'burt, as such supervisor and railroad commissioners as aforesaid, and under their official signatures, at the same time of the execution of said bond by them, as aforesaid, to wit, on the said second day of March, 1853, duly attached to said bond No. 12, thirty-nine several coupons, or promises to pay, the semi-annual interest of thirty-five dollars each, which would become due and payable, upon the expiration of each and every six months from and after the first day of January, one thousand eight hundred and fifty-four, until the first day of January, one thousand eight hundred and seventy-three, each and every of which coupons was substantially in the following form, except the time of payment therein specified, to wit:

"$35. The town of Genoa, in the county of Cayuga, hereby acknowledges that there will be due to the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York, on the first day of , being interest due on that day on bond No. 12."

That afterwards, and before said bond No. 12 was negotiated or delivered by said town of Genoa to any person, to wit, on the 22d day of August, 1853, the then clerk of said county of Cayuga, at the request of the said town of Genoa, made and endorsed upon bond No. 12 his certificate in writing, duly signed by him in his official character as such clerk of said county of Cayuga, whereby he, the said clerk, under his said official signature, certified that a paper purporting to be the written assent of two-thirds of the resident tax-payers of said town of Genoa, with the affidavit required by section one of the act referred to by its title in said bond, had been filed in said clerk's office.

That the said supervisor and railroad commissioners, and acting as such, afte'wards, and after the execution of said bond and coupons as aforesaid, and after the organization of said railroad company as aforesaid, and after the written assent of two-thirds of the resident persons taxed in said town of Venice had been obtained and filed as aforesaid, together with the affidavit required by section one of said act, to wit, on the first day of January, 1854, at the said town of Genoa, borrowed, on the faith and credit of said town, of Ashbel Avery, from a person unknown to this plaintiff, the sum of one thousand dollars, for the purpose and in accordance with the provisions, and in virtue of said act of said legislature, and to secure the payment thereof with interest thereon, at the rate of seven per cent. per annum, from the time of such borrowing, delivered the said bond No. 12, with the coupons hereinbefore mentioned thereto attached, and the said certificate of the clerk of the county of Cayuga hereinbefore mentioned thereon endorsed, to him, the said Ashbel Avery, the lender of said money, who thereby, then and there, became and was the owner, holder, and bearer thereof.

That afterwards, to wit, on the first day of January, 1857, at Indianapolis, in said State of Indiana, they, the said plaintiff', for a valuable consid-

eration, then paid by them therefor, purchased and became, and have continued ever since to be, and now are, the owners, holders, and bearers of said bond No. 12, together with the said coupons thereto attached, all of which then remained unpaid. And the said bond No. 12, with the said coupons attached, was thereupon then and there delivered to them, the said plaintiffs, and the same has ever since continued and remained and still remains in their possession, as such owners, holders, and bearers thereof, and they the said plaintiffs thereby became, and were, and still are, entitled to demand, have, and receive the monies due and remaining unpaid thereon, and also the monies thereafter to become due and payable thereon, when, and as the same should thereafter become due and payable, according to the terms and conditions thereof.

And the said plaintiffs aver that the said town of Genoa had not, at the time the moneys mentioned in said bond and in said several coupons became due and payable, nor has said town of Genoa at any time since had, at the said the Bank of the State of New York, in the said city of New York, or elsewhere, any money or means, whereby the said several sums acknowledged by said town of Genoa to be due, could be, or would have been, paid, had a demand thereof been made when the same became due and payable, as provided in and by the terms of said bond, and of said several coupons, nor at any time since; and although often requested so to do, the said town of Genoa has hitherto wholly refused, and still does refuse, to pay the said several sums, in said coupons and said bond specified, and being the principal and interest which accrued upon said bond from the first day of January, 1854, to the first day of January, 1873, and which became due and payable to the owner of said bond and said coupons on said several days, in that behalf hereinbefore specified. And said plaintiffs fu'ther aver that the whole of the said principal sum of one thousand dollars, together with the interest thereon from the first day of January, 1855, and the interest upon the several sums so as aforesaid mentioned in said several coupons, from the time the same severally became due and payable, still remain due and unpaid, and said defendant, although often requested so to do, has hitherto wholly refused, and still does refuse, to pay the same or any part there'f, to them the said plaintiffs.

11 Fifth. And for a further and fifth cause of action, the said plaintiffs further say and aver—

That heretofore, to wit, on the 16th day of April, 1852, an act was duly passed by the legislature of the State of New York, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie, or Cayuga and Susquehannah Railroad," whereby it was, amongst other things, enacted that it should be lawful for the supervisor of any town in the said county of Cayuga, and the assessors of such town, in said county, who were appointed by said act as commissioners to act in conjunction with said supervisor in effecting and executing the purposes of said act, to borrow, on the faith and credit of said town, such sum of money as they, said supervisor and assessors, might deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as might be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds, on which the interest should be made payable annually, or semi-annually, during the term said money might be borrowed, and the principal and interest of which loan should be made payable in such sums

and at such times and place as should be agreed upon and expressed in the bonds duly executed under the authority of said act.

And wherein and whereby it was further enacted that said assessors, appointed to act as commissioners, by section first of said act, should hold their office till the next annual town-meeting of their town, when it should be the duty of the electors of said town to elect by ballot, in the same manner that town officers were then elected, two commissioners, to be called "railroad commissioners," to act in conjunction with the supervisor in carrying into effect the provisions of said act, and that the action of a majority of such supervisor and commissioners should, at all times, be sufficient for carrying into effect the provisions of said act.

That it was in said act further provided that the said supervisor and commissioners should have no power to do any of the acts authorized by said act until a railroad company had been duly organized accordind to the requirements of the general railroad law, for the purpose of constructing the aforesaid described railroad, to wit: A railroad passing through the city of Auburn and connecting Lake Ontario with the Susquehannah and Cayuga Railroad, or the New York and Erie Railroad, and until the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprise two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

That a railroad company, to wit, The Lake Ontario, Auburn and New York Railroad Company, was duly organized, to wit, on the 23d day of August, 1852, according to the provisions of the general railroad law of the State of New York, passed April 2d, 1850, for constructing, maintaining, and operating a railroad for public use, in the conveyance of persons and property, commencing at some point on the Susquehanna and Cayuga Railroad, to wit, about seven miles from the village of Ithaca, in the County of Tompkins and State of New York, and extending thence to the city of Auburn, and thence to the termination of said railroad at Little Sodus Bay, in the town of Sterling, Cayuga County.

That the written assent of two-thirds of the resident persons taxed in said town of Genoa, as appeared on the assessment-roll of said town of Genoa, made next previous to the time of borrowing the money authorized by said act, had been obtained, in pursuance of said act, and filed in clerk's office of Cayuga County, together with the affidavit required by said act attached to said written assents and statement, to the effect that the persons whose written assents were thereto attached and filed as aforesaid comprised two-thirds of all the resident tax-payers of said town of Genoa on its assessment-roll next previous to the obtaining said written assents before the execution and delivery of any bonds by said supervisor and commissioners of said town of Genoa.

That afterwards, to wit, on the 26th day of February, 1853, John King, who was then supervisor of said town of Genoa, and Allen Palmer and Amos Hur'burt, who were then the railroad commissioners of said town of Genoa, theretofore duly elected by the electors of said town of Genoa according to said act, and by virtue thereof, under their several signatures, duly executed a certain writing obligatory, or bond of said town, bearing date the said 26 day of February, 1853, and numbered

thirteen in the series of bonds executed under and in virtue of said act, whereby the said town of Genoa, in pursuance of said act of the legislature of the State of New York, acknowledged itself to owe, and promised to pay, to the bearer of said bond No. 13 the sum of one thousand dollars, with interest at the rate of seven per cent. per annum, payable semi-annually on the first day of January and July in each year, on surrender of the coupons to said bond attached, at the Bank of the State of New York, in the city of New York, the principal to be re-imbursed at the same place at the expiration of twenty years from the first day of January, 1853.

That the said John King and Allen Palmer and Amos Hurlbert, as such supervisor and railroad commissioners as aforesaid and under their official signatures, at the same time of the execution of said bond by them, as aforesaid, to wit, on the said second day of March, 1853, duly attached to said bond No. 13 thirty-nine several coupons, or promises to pay, the semi-annual interest of thirty-five dollars each, which would become due and payable upon the expiration of each and every six months from and after the first day of January, one thousand
12 eight hundred and fifty-four, until the first day of January, one thousand eight hundred and seventy-three, each and every of which coupons was substantially in the following form, except the time of payment therein specified, to wit:

"$35. The town of Genoa, in the county of Cayuga, hereby acknowledges that there will be due the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York, on the first day of , being interest due on that day on bond No. ."

That afterwards and before said bond No. 13 was negotiated or delivered by said town of Genoa to any person, to wit, on the 22 day of August, 1853, the then clerk of said county of Cayuga, at the request of the said town of Genoa, made and endorsed upon bond No. 13 his certificate in writing, duly signed by him in his official character as such clerk of said county of Cayuga, whereby he, the said clerk, under his said official signature, certified that a paper purporting to be the written assent of two thirds of the resident tax-payers of said town of Genoa, with the affidavit required by section one of the act referred to by its title in said bond, had been filed in said clerk's office.

That the said supervisor and railroad commissioners, and acting as such, afte'wards and after the execution of said bond and coupons as aforesaid, and after the organization of said railroad company as aforesaid, and after the written assent of two-thirds of the resident persons taxed in said town of Venice had been obtained and filed as aforesaid, together with the affidavit required by section one of said act, to wit, on the first day of January, 1854, at the said town of Genoa, borrowed, on the faith and credit of said town, of Ashbel Avery, the sum of one thousand dollars, for the purpose and in accordance with the provisions, and in virtue of said act of said legislature, and to secure the payment thereof with interest thereon, at the rate of seven per cent. per annum, from the time of such borrowing, delivered the said bond No. 13, with the coupons hereinbefore mentioned, thereto attached, and the said certificate of the clerk of the county of Cayuga hereinbefore mentioned thereon endorsed, to him, the said Ashbel Avery, the lender of said money, who thereby, then and there, became and was the owner, holder, and bearer thereof.

That afterwards, to wit, on the first day of January, 1857, at Indianapolis, in said State of Indiana, they, the said plaintiffs, for a valuable consideration then paid by them therefor, purchased and became, and

have ever since continued to be, and now are, the owners, holders, and bearers of said bond No. 13, together with the said coupons thereto attached, all of which then remained unpaid. And the said bond No. 13, with the said coupons attached, was thereupon then and there delivered to them, the said plaintiffs, and the same has ever since continued and remained, and still remains in their possession as such owners, holders, and bearers thereof, and they, the said plaintiffs, thereby became and were and still are entitled to demand, have, and receive the monies due and remaining unpaid thereon, and also the monies thereafter to become due and payable thereon, when, and as the same should thereafter become due and payable, according to the terms and conditions thereof.

And the said plaintiffs aver that the said town of Genoa had not, at the time the moneys mentioned in said bond and in said several coupons became due and payable, nor has said town of Genoa at any time since, had, at the said the Bank of the State of New York, in the said city of New York, or elsewhere, any money or means whereby the said several sums acknowledged by said town of Genoa to be due, could be, or would have been, paid had a demand thereof been made when the same became due and payable, as provided in and by the terms of said bond, and of said several coupons, nor at any time since, and although often requested so to do, the said town of Genoa has hitherto wholly refused, and still does refuse, to pay the said several sums in said coupons and said bond specified, and being the principal and interest which accrued upon said bond from the first day of January, 1854, to the first day of January, 1873, and which became due and payable to the owner of said bond and said coupons on said several days, in that behalf hereinbefore specified. And said plaintiffs fu'ther aver that the whole of the said principal sum of one thousand dollars, together with the interest thereon from the first day of January, 1855, and the interest upon the several sums so as aforesaid mentioned in said several coupons from the time the same severally became due and payable, still remain due and unpaid, and said defendant, although often requested so to do, has hitherto wholly refused, and still does refuse, to pay the same, or any part there'f, to them, the said plaintiffs.

13 Sixth. And for a further and sixth cause of action, the said plaintiffs further say and aver—

That heretofore, to wit, on the 16th day of April, 1852, an act was duly passed by the legislature of the State of New York, entitled, "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie, or Cayuga and Susquehannah Railroad," whereby it was, amongst other things, enacted that it should be lawful for the supervisor of any town in the said county of Cayuga, and the assessors of such town in said county, who were appointed by said act as commissioners, to act in conjunction with said supervisor in effecting and executing the purposes of said act, to borrow, on the faith and credit of said town, such sum of money as they, said supervisor and assessors, might deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as might be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds, on which the interest should be made payable annually, or semi-annually, during the term said money might be borrowed, and the principal and interest of which loan should be made payable in such sums and at such times and place as should be agreed upon and expressed in the bonds duly executed under the authority of said act.

And wherein and whereby it was further enacted that said assessors, appointed to act as commissioners by section first of said act, should hold their office till the next annual town-meeting of their town, when it should be the duty of the electors of said town to elect by ballot, in the same manner that town-officers were then elected, two commissioners, to be called "railroad commissioners," to act in conjunction with the supervisor in carrying into effect the provisions of said act, and that the action of a majority of such supervisor and commissioners should at all times be sufficient for carrying into effect the provisions of said act.

That it was in said act further provided that the said supervisor and commissioners should have no power to do any of the acts authorized by said act until a railroad company had been duly organized, according to the requirements of the general railroad law, for the purpose of constructing the aforesaid described railroad, to wit: A railroad passing through the city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga Railroad, or the New York and Erie Railroad; and until the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprise two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

That a railroad company, to wit, the Lake Ontario, Auburn, and New York Railroad Company, was duly organized, to wit, on the 23d day of August, 1852, according to the provisions of the general railroad law of the State of New York, passed April 2d, 1850, for constructing, maintaining, and operating a railroad for public use, in the conveyance of persons and property, commencing at some point on the Susquehannah and Cayuga Railroad, to wit, about seven miles from the village of Ithaca, in the county of Tompkins, and State of New York, and extending thence to the city of Auburn, and thence to the termination of said railroad at Little Sodus Bay, in the town of Sterling, Cayuga County.

That the written assent of two-thirds of the resident persons taxed in said town of Genoa, as appeared on the assessment-roll of said town of Genoa made next previous to the time of borrowing the money authorized by said act, had been obtained in pursuance of said act, and filed in clerk's office of Cayuga County, together with the affidavit required by said act attached to said written assents and statement, to the effect that the persons whose written assents were thereto attached and filed as aforesaid comprised two-thirds of all the resident tax-payers of said town of Genoa on its assessment-roll next previous to the obtaining said written assents, before the execution and delivery of any bonds by said supervisor and commissioners of said town of Genoa.

That afterwards, to wit, on the 26th day of February, 1853, John King, who was then supervisor of said town of Genoa, and Allen Palmer and Amos Hurlburt, who were then the railroad commissioners of said town of Genoa, theretofore duly elected by the electors of said town of Genoa, according to said act, and by virtue thereof, under their several signatures, duly executed a certain writing obligatory, or bond, of said town, bearing date the said 26 day of February, 1853, and numbered fourteen in the series of bonds executed under and in virtue of said act, whereby the said town of Genoa, in pursuance of said act of the legislature of the

State of New York, acknowledged itself to owe and promised to pay to the bearer of said bond No. 14 the sum of one thousand dollars, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first day of January and July in each year, on surrender of the coupons to said bond attached, at the Bank of the State of New York, in the city of New York, the principal to be re-imbursed at the same place at the expiration of twenty years from the first day of January, 1853.

That the said John King and Allen Palmer and Amos Hurlburt, as such supervisor and railroad commissioners, as aforesaid, and under their official signatures, at the same time of the execution of said bond by them as aforesaid, to wit, on the said second day of March, 1853, duly attached to said bond No. 14 thirty-nine several coupons or promises to pay the semi-annual interest of thirty-five dollars each, which would become due and payable upon the expiration of each and every six months from and after the first day of January, one thousand
14 eight hundred and fifty-four, until the first day of January, one thousand eight hundred and seventy-three, each and every of which coupons was substantially in the following form, except the time of payment therein specified, to wit:

"$35. The town of Genoa, in the county of Cayuga, hereby acknowledges that there will be due the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York, on the first day of , being interest due on that day on bond No. 14."

That afterwards, and before said bond No. 14 was negotiated or delivered by said town of Genoa to any person, to wit, on the 22d day of August, 1853, the then clerk of said county of Cayuga, at the request of the said town of Genoa, made and endorsed upon bond No. 14 his certificate in writing, duly signed by him in his official character as such clerk of said county of Cayuga, whereby he, the said clerk, under his said official signature, certified that a paper purporting to be the written assent of two-thirds of the resident tax-payers of said town of Genoa, with the affidavit required by section one of the act referred to by its title in said bond, had been filed in said clerk's office.

That the said supervisor and railroad commissioners, and acting as such, afte'wards and after the execution of said bond and coupons as aforesaid, and after the organization of said railroad company as aforesaid, and after the written assent of two-thirds of the resident persons taxed in said town of Venice had been obtained and filed as aforesaid, together with the affidavit required by section one of said act, to wit, on the first day of January, 1854, at the said town of borrowed, on the faith and credit of said town, of Ashbel Avery, the sum of one thousand dollars, for the purpose and in accordance with the provisions and in virtue of said act of said legislature; and to secure the payment thereof with interest thereon at the rate of seven per cent. per annum from the time of such borrowing, delivered the said bond No. 14, with the coupons hereinbefore mentioned thereto attached, and the said certificate of the clerk of the county of Cayuga hereinbefore mentioned thereon endorsed, to him, the said Ashbel Avery, the lender of said money, who thereby, then and there, became and was the owner, holder, and bearer thereof.

That afterwards, to wit, on the first day of January, 1857, at Indianapolis, in the State of Indiana, they, the said plaintiffs, for a valuable consideration, then paid by them therefor, purchased and became, and have ever since continued to be, and now are, the owners, holders, and bearers of said bond No. 14, together with the said coupons thereto attached, all of which then remained unpaid. And the said bond No. 14, with the said

coupons attached, was thereupon then and there delivered to them, the said plaintiffs, and the same has ever since continued and remained, and still remains, in their possession as such owners, holders, and bearers thereof, and *he*, the said plaintiff', thereby became and were, and still are, entitled to demand, have, and receive the monies due and remaining unpaid thereon, and also the monies thereafter to become due and payable thereon, when and as the same should thereafter become due and payable, according to the terms and conditions thereof.

And the said plaintiffs aver that the said town of Genoa had not at the time the moneys mentioned in said bond and in said several coupons became due and payable, nor has said town of Genoa at any time since, had at the said The Bank of the State of New York, in the said city of New York, or elsewhere, any money or means whereby the said several sums, acknowledged by said town of Genoa to be due, could be or would have been paid, had a demand thereof been made when the same became due and payable, as provided in and by the terms of said bond, and of said several coupons, nor at any time since; and although often requested so to do, the said town of Genoa has hitherto wholly refused, and still does refuse, to pay the said several sums in said coupons and said bond specified, and being the principal and interest which accrued upon said bond from the first day of January, 1854, to the first day of January, 1873, and which became due and payable to the owner of said bond and said coupons on said several days in that behalf hereinbefore specified. And said plaintiffs fu'ther aver that the whole of the said principal sum of one thousand dollars, together with the interest thereon from the first day of January, 1855, and the interest upon the several sums so as aforesaid mentioned in said several coupons, from the time the same severally became due and payable, still remain due and unpaid; and said defendant, although often requested so to do, has hitherto wholly refused, and still does refuse to pay the same, or any part there'f, to them, the said plaintiffs.

15 Seventh. And for a further and seventh cause of action, the said plaintiffs further say and aver—

That heretofore, to wit, on the 16th day of April, 1852, an act was duly passed by the legislature of the State of New York, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie, or Cayuga and Susquehannah Railroad," whereby it was, amongst other things, enacted that it should be lawful for the supervisor of any town in the said county of Cayuga, and the assessors of such town, in said county, who were appointed by said act as commissioners to act in conjunction with said supervisor in effecting and executing the purposes of said act, to borrow, on the faith and credit of said town, such sum of money as they, said supervisor and assessors, might deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as might be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds, on which the interest should be made payable annually, or semi-annually, during the term said money might be borrowed, and the principal and interest of which loan should be made payable in such sums, and at such times and place, as should be agreed upon and expressed in the bonds duly executed under the authority of said act.

And wherein and whereby it was further enacted that said assessors, appointed to act as commissioners, by section first of said act, should hold their office till the next annual town-meeting of their town, when

it should be the duty of the electors of said town to elect by ballot, in the same manner that town officers were then elected, two commissioners, to be called "railroad commissioners," to act in conjunction with the supervisor in carrying into effect the provisions of said act, and that the action of a majority of such supervisor and commissioners should, at all times, be sufficient for carrying into effect the provisions of said act.

That it was in said act further provided that the said supervisor and commissioners should have no power to do any of the acts authorized by said act until a railroad company had been duly organized, according to the requirements of the general railroad law, for the purpose of constructing the aforesaid described railroad, to wit, a railroad passing through the city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga Railroad, or the New York and Erie Railroad, and until the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town, made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprise two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

That a railroad company, to wit, the Lake Ontario, Auburn and New York Railroad Company, was duly organized, to wit, on the 23d day of August, 1852, according to the provisions of the general railroad law of the State of New York, passed April 2d, 1850, for constructing, maintaining, and operating a railroad for public use, in the conveyance of persons and property, commencing at some point on the Susquehannah and Cayuga Railroad, to wit, about seven miles from the village of Ithaca, in the county of Tompkins and State of New York, and extending thence to the city of Auburn, and thence to the termination of said railroad at Little Sodus Bay, in the town of Sterling, Cayuga County.

That the written assent of two-thirds of the resident persons taxed in said town of Genoa, as appeared on the assessment-roll of said town of Genoa, made next previous to the time of borrowing the money authorized by said act, had been obtained in pursuance of said act, and filed in clerk's office of Cayuga County, together with the affidavit required by said act attached to said written assents and statement, to the effect that the persons whose written assents were thereto attached and filed as aforesaid comprised two-thirds of all the resident tax-payers of said town of Genoa on its assessment-roll next previous to the obtaining said written assents, before the execution and delivery of any bonds by said supervisor and commissioners of said town of Genoa.

That afterwards, to wit, on the 26th day of February, 1853, John King, who was then supervisor of said town of Genoa, and Allen Palmer and Amos Hurlburt, who were then the railroad commissioners of said town of Genoa, theretofore duly elected by the electors of said town of Genoa, according to said act, and by virtue thereof, under their several signatures, duly executed a certain writing obligatory or bond of said town, bearing date the said 26 day of February, 1853, and numbered fifteen in the series of bonds executed under and in virtue of said act, whereby the said town of Genoa, in pursuance of said act of the legislature of the State of New York, acknowledged itself to owe, and promised to pay to the bearer of said bond No. 15, the sum of one thousand dollars, with interest at the rate of seven per cent. per annum, payable

semi-annually, on the first day of January and July in each year, on surrender of the coupons to said bond attached at the Bank of the State of New York, in the city of New York, the principal to be re-imbursed at the same place at the expiration of twenty years from the first day of January, 1853.

That the said John King and Allen Palmer & Amos Hurlburt, as such supervisor and railroad commissioners, as aforesaid, and under their official signatures, at the same time of the execution of said bond by them, as aforesaid, to wit, on the said second day of March, 1853, duly attached to said bond No. 15 thirty-nine several coupons, or promises to pay, the semi-annual interest of thirty-five dollars each, which would become due and payable upon the expiration of each and every six months from and after the first day of January, one thousand
16 eight hundred and fifty-four, until the first day of January, one thousand eight hundred and seventy-three, each and every of which coupons was substantially in the following form, except the time of payment therein specified, to wit:

"$35. The town of Genoa, in the county of Cayuga, hereby acknowledges that there will be due the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York, on the first day of , being interest due on that day on bond No. 15."

That afterwards, and before said bond No. 15 was negotiated or delivered by said town of Genoa to any person, to wit, on the 22d of August, 1853, the then clerk of said county of Cayuga, at the request of the said town of Genoa, made and endorsed upon bond No. 15 his certificate in writing, duly signed by him in his official character as such clerk of said county of Cayuga, whereby he, the said clerk, under his said official signature, certified that a paper, purporting to be the written assent of two-thirds of the resident tax-payers of said town of Genoa, with the affidavit required by section one of the act referred to by its title in said bond, had been filed in said clerk's office.

That the said supervisor and railroad commissioners, and acting as such, afte'wards, and after the execution of said bond and coupons as aforesaid, and after the organization of said railroad company as aforesaid, and after the written assent of two-thirds of the resident persons taxed in said town of Venice had been obtained and filed as aforesaid, together with the affidavit required by section one of said act, to wit, on the first day of January, 1854, at the said town of Genoa, borrowed, on the faith and credit of said town, of Ashbel Avery, the sum of one thousand dollars, for the purpose and in accordance with the provisions, and in virtue of said act of said legislature, and to secure the payment thereof with interest thereon, at the rate of seven per cent. per annum, from the time of such borrowing, delivered the said bond No. 15, with the coupons, hereinbefore mentioned, thereto attached, and the said certificate of the clerk of the county of Cayuga, hereinbefore mentioned, thereon endorsed, to him, the said Ashbel Avery, the lender of said money, who, thereby, then and there, became and was the owner, holder, and bearer thereof.

That afterwards, to wit, on the first day of January, 1857, at Indianapolis, in said State of Indiana, they, the said plaintiffs, for a valuable consideration then paid by them therefor, purchased and became, and have ever since continued to be, and now are, the owners, holders, and bearers of said bond No. 15, together with the said coupons thereto attached, all of which then remained unpaid. And the said bond No. 15, with the said coupons attached, was thereupon, then and there, delivered to them, the said plaintiffs, and the same has ever since continued and

remained, and still remains, in their possession as such owner, holder, and bearer thereof, and they, the said plaintiffs, thereby became and were, and still are, entitled to demand, have, and receive the monies due and remaining unpaid thereon, and also the monies thereafter to become due and payable thereon, when and as the same should thereafter become due and payable, according to the terms and conditions thereof.

And the said plaintiffs aver that the said town of Genoa had not, at the time the moneys mentioned in said bond and in said several coupons became due and payable, nor has said town of Genoa, at any time since, had, at the said the Bank of the State of New York, in the said city of New York, or elsewhere, any money or means whereby the said several sums, acknowledged by said town of Genoa to be due, could be or would have been paid, had a demand thereof been made when the same became due and payable, as provided in and by the terms of said bond, and of said several coupons, nor at any time since; and although often requested so to do, the said town of Genoa has hitherto wholly refused, and still does refuse, to pay the said several sums in said coupons and said bond specified, and being the principal and interest which accrued upon said bond from the first day of January, 1854, to the first day of January, 1873, and which became due and payable to the owner of said bond and said coupons on said several days in that behalf hereinbefore specified. And said plaintiffs fu'ther aver that the whole of the said principal sum of one thousand dollars, together with the interest thereon from the first day of January, 1855, and the interest upon the several sums so as aforesaid mentioned in said several coupons from the time the same severally became due and payable, still remain due and unpaid; and said defendant, although often requested so to do, has hitherto wholly refused, and still does refuse, to pay the same, or any part ther'of, to them, the said plaintiffs.

17 Eighth. And for a further and eighth cause of action the said plaintiffs further say and aver—

That heretofore, to wit, on the 15th day of April, 1852, an act was duly passed by the legislature of the State of New York, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehannah Railroad," whereby it was, amongst other things, enacted that it should be lawful for the supervisor of any town in the said county of Cayuga, and the assessors of such town, in said county, who were appointed by said act as commissioners to act in conjunction with said supervisor in effecting and executing the purposes of said act, to borrow, on the faith and credit of said town, such sum of money as they, said supervisor and assessors, might deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as might be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds, on which the interest should be made payable annually or semi-annually during the term said money might be borrowed, and the principal and interest of which loan should be made payable in such sums and at such times and place as should be agreed upon and expressed in the bonds duly executed under the authority of said act.

And wherein and whereby it was further enacted that said assessors, appointed to act as commissioners by section first of said act, should hold their office till the next annual town meeting of their town, when it should be the duty of the electors of said town to elect by ballot, in the same manner that town officers were then elected, two commissioners,

to be called "railroad commissioners," to act in conjunction with the supervisor in carrying into effect the provisions of said act, and that the action of a majority of such supervisor and commissioners should at all times be sufficient for carrying into effect the provisions of said act.

That it was in said act further provided that the said supervisor and commissioners should have no power to do any of the acts authorized by said act until a railroad company had been duly organized, according to the requirements of the general railroad law, for the purpose of constructing the aforesaid described railroad, to wit: A railroad passing through the city of Auburn and connecting Lake Ontario with the Susquehannah and Cayuga Railroad or the New York and Erie Railroad, and until the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town, made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprise two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

That a railroad company, to wit, the Lake Ontario, Auburn and New York Railroad Company, was duly organized, to wit, on the 23d day of August, 1852, according to the provisions of the general railroad law of the State of New York, passed April 2d, 1850, for constructing, maintaining, and operating a railroad for public use in the conveyance of persons and property, commencing at some point on the Susquehannah and Cayuga Railroad, to wit, about seven miles from the village of Ithaca, in the county of Tompkins and State of New York, and extending thence to the city of Auburn, and thence to the termination of said railroad at Little Sodus Bay, in the town of Sterling, Cayuga County.

That the written assent of two-thirds of the resident persons taxed in said town of Genoa, as appeared on the assessment-roll of said town of Genoa made next previous to the time of borrowing the money authorized by said act, had been obtained in pursuance of said act and filed in clerk's office of Cayuga County, together with the affidavit required by said act attached to said written assents and statement, to the effect that the persons whose written assents were thereto attached and filed as aforesaid comprised two-thirds of all the resident tax-payers of said town of Genoa on its assessment-roll next previous to the obtaining said written assents before the execution and delivery of any bonds by said supervisor and commissioners of said town of Genoa.

That afterwards, to wit, on the 26 day of February, 1853, John King, who was then supervisor of said town of Genoa, and Allen Palmer and Amos Hurlburt, who were then the railroad commissioners of said town of Genoa, theretofore duly elected by the electors of said town of Genoa according to said act, and by virtue thereof, under their several signatures, duly executed a certain writing obligatory, or bond, of said town, bearing date the said 26 day of February, 1853, and numbered sixteen in the series of bonds executed under and in virtue of said act, whereby the said town of Genoa, in pursuance of said act of the legislature of the State of New York, acknowledged itself to owe, and promised to pay to the bearer of said bond No. 16, the sum of one thousand dollars, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first day of January and July in each year, on sur-

render of the coupons to said bond attached, at the Bank of the State of New York, in the city of New York, the principal to be re-imbursed at the same place at the expiration of twenty years from the first day of January, 1853.

That the said John King and Allen Palmer and Amos Hurlburt, as such supervisor and railroad commissioners as aforesaid, and under their official signatures, at the same time of the execution of said bond by them as aforesaid, to wit, on the said second day of March, 1853, duly attached to said bond No. 16 thirty-nine several coupons or promises to pay the semi-annual interest, of thirty-five dollars each, which would become due and payable upon the expiration of each and every six months from and after the first day of January, one thousand 18 eight hundred and fifty-four, until the first day of January, one thousand eight hundred and seventy-three, each and every of which coupons was substantially in the following form, except the time of payment therein specified, to wit:

"$35. The town of Genoa, in the county of Cayuga, hereby acknowledges that there will be due the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York, on the first day of , being interest due on that day on bond No. 16."

That afterwards, and before said bond No. 16 was negotiated or delivered by said town of Genoa to any person, to wit, on the 22 day of August, 1853, the then clerk of said county of Cayuga, at the request of the said town of Genoa, made and endorsed upon bond No. 16 his certificate in writing, duly signed by him in his official character as such clerk of said county of Cayuga, whereby he, the said clerk, under his said official signature, certified that a paper purporting to be the written assent of two-thirds of the resident tax-payers of said town of Genoa, with the affidavit required by section one of the act referred to by its title in said bond, had been filed in said clerk's office.

That the said supervisor and railroad commissioners, and acting as such, afte'wards, and after the execution of said bonds and coupons as aforesaid, and after the organization of said railroad company as aforesaid, and after the written assent of two-thirds of the resident persons taxed in said town of Venice had been obtained and filed as aforesaid, together with the affidavit required by section one of said act, to wit, on the first day of January, 1854, at the said town of Genoa, borrowed, on the faith and credit of said town , of Ashbel Avery the sum of one thousand dollars for the purpose, and in accordance with the provisions and in virtue of said act of said legislature, and to secure the payment thereof, with interest thereon, at the rate of seven per cent. per annum from the time of such borrowing, delivered the said bond No. 16, with the coupons hereinbefore mentioned thereto attached, and the said certificate of the clerk of the county of Cayuga hereinbefore mentioned thereon endorsed, to him, the said Ashbel Avery, the lender of said money, who thereby then and there became and was the owner, holder, and bearer thereof.

That afterwards, to wit, on the first day of January, 1857, at Indianapolis, in said State of Indian', they, the said plaintiffs, for a valuable consideration paid by them therefor, purchased and became, and have ever since continued to be and now are, the owners, holders, and bearers of said bond No. 16, together with the said coupons thereto attached, all of which then remained unpaid. And the said bond No. 16, with the said coupons attached, was thereupon then and there delivered to them, the said plaintiffs, and the same has ever since continued and remained, and still remains, in their possession as such owners, holders, and bearers

thereof, and they, the said plaintiffs, thereby became and were and still are entitled to demand, have, and receive the monies due and remaining unpaid thereon, and also the monies thereafter to become due and payable thereon, when and as the same should thereafter become due and payable according to the terms and conditions thereof.

And the said plaintiffs aver that the said town of Genoa had not at the time the moneys mentioned in said bond and in said several coupons became due and payable, nor has said town of Genoa at any time since, had at the said The Bank of the State of New York, in the said city of New York, or elsewhere, any money or means whereby the said several sums acknowledged by said town of Genoa to be due could be or would have been paid had a demand thereof been made when the same became due and payable as provided in and by the terms of said bond and of said several coupons, nor at any time since; and, although often requested so to do, the said town of Genoa has hitherto wholly refused, and still does refuse, to pay the said several sums in said coupons and said bond specified; and being the principal and interest which accrued upon said bond from the first day of January, 1854, to the first day of January, 1873, and which became due and payable to the owner of said bond and said coupons on said several days in that behalf hereinbefore specified. And said plaintiffs fu'ther aver that the whole of the said principal sum of one thousand dollars, together with the interest thereon from the first day of January, 1855, and the interest upon the several sums so as aforesaid mentioned in said several coupons from the time the same severally became due and payable, still remain due and unpaid, and said defendant, although often requested so to do, has hitherto wholly refused, and still does refuse, to pay the same, or any part there'f, to him, the said plaintiff.

19 Ninth. And for a further and ninth cause of action the said plaintiffs further say and aver—

That heretofore, to wit, on the 16th day of April, 1852, an act was duly passed by the legislature of the State of New York, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie, or Cayuga and Susquehannah Railroad," whereby it was, amongst other things, enacted that it should be lawful for the supervisor of any town in the said county of Cayuga, and the assessors of such town, in said county, who were appointed by said act as commissioners to act in conjunction with said supervisor in effecting and executing the purposes of said act, to borrow, on the faith and credit of said town, such sum of money as they, said supervisor and assessors, might deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as might be agreed upon not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds, on which the interest should be made payable annually or semi-annually during the term said money might be borrowed, and the principal and interest of which loan should be made payable in such sums and at such times and place as should be agreed upon and expressed in the bonds duly executed under the authority of said act.

And wherein and whereby it was further enacted that said assessors, appointed to act as commissioners by section first of said act, should hold their office till the next annual town meeting of their town, when it should be the duty of the electors of said town to elect by ballot, in the same manner that town officers were then elected, two commissioners, to be called "railroad commissioners," to act in conjunction

with the supervisor in carrying into effect the provisions of said act, and that the action of a majority of such supervisor and commissioners should at all times be sufficient for carrying into effect the provisions of said act.

That it was in said act further provided that the said supervisor and commissioners should have no power to do any of the acts authorized by said act until a railroad company had been duly organized, according to the requirements of the general railroad law, for the purpose of constructing the aforesaid described railroad, to wit: a railroad passing through the city of Auburn and connecting Lake Ontario with the Susquehannah and Cayuga Railroad or the New York and Erie Railroad, and until the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprise two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

That a railroad company, to wit, the Lake Ontario, Auburn and New York Railroad Company, was duly organized, to wit, on the 23d day of August, 1852, according to the provisions of the general railroad law of the State of New York, passed April 2d, 1850, for constructing, maintaining, and operating a railroad for public use in the conveyance of persons and property, commencing at some point on the Susquehannah and Cayuga Railroad, to wit, about seven miles from the village of Ithaca, in the county of Tompkins and State of New York, and extending thence to the city of Auburn, and thence to the termination of said railroad at Little Sodus Bay, in the town of Sterling, Cayuga County.

That the written assent of two-thirds of the resident persons taxed in said town of Genoa, as appeared on the assessment-roll of said town of Genoa made next previous to the time of borrowing the money authorized by said act, had been obtained in pursuance of said act, and filed in clerk's office of Cayuga County, together with the affidavit required by said act attached to said written assents and statement, to the effect that the persons whose written assents were thereto attached and filed as aforesaid comprised two-thirds of all the resident tax-payers of said town of Genoa on its assessment-roll next previous to the obtaining said written assents, before the execution and delivery of any bonds by said supervisor and commissioners of said town of Genoa.

That afterwards, to wit, on the 26th day of February, 1853, John King, who was then supervisor of said town of Genoa, and Allen Palmer and Amos Hurlburt, who were then the railroad commissioners of said town of Genoa, theretofore duly elected by the electors of said town of Genoa according to said act and by virtue thereof, under their several signatures, duly executed a certain writing obligatory, or bond, of said town, bearing date the said 26th day of February, 1853, and numbered seventeen in the series of bonds executed under and in virtue of said act, whereby the said town of Genoa, in pursuance of said act of the legislature of the State of New York, acknowledged itself to owe, and promised to pay to the bearer of said bond No. 17, the sum of one thousand dollars, with interest at the rate of seven per cent. per annum, payable semi-annually on the first day of January and July in each year, on surrender of the coupons to said bond attached, at the Bank of the

State of New York, in the city of New York, the principal to be re-imbursed at the same place, at the expiration of twenty years from the first day of January, 1853.

That the said John King and Allen Palmer and Amos Hurlburt, as such supervisor and railroad commissioners as aforesaid, and under their official signatures, at the same time of the execution of said bond by them as aforesaid, to wit, on the said second day of March, 1853, duly attached to said bond No. 17 thirty-nine several coupons, or promises to pay, the semi-annual interest of thirty-five dollars each, which would become due and payable upon the expiration of each and every six months from and after the first day of January, one thousand eight hundred and fifty-four, until the first day of January, one thousand eight hundred and seventy-three, each and every of which coupons was substantially in the following form, except the time of payment therein specified, to wit:

"$35. The town of Genoa, in the county of Cayuga, hereby acknowledges that there will be due the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York, on the first day of ———, being interest due on that day on bond No. 17."

That afterwards, and before said bond No. 17 was negotiated or delivered by said town of Genoa to any person, to wit, on the 22 day of August, 1853, the then clerk of said county of Cayuga, at the request of the said town of Genoa, made and endorsed upon bond No. 17 his certificate in writing, duly signed by him in his official character as such clerk of said county of Cayuga, whereby he, the said clerk, under his said official signature, certified that a paper purporting to be the written assent of two-thirds of the resident tax-payers of said town of Genoa, with the affidavit required by section one of the act referred to by its title in said bond, had been filed in said clerk's office.

That the said supervisor and railroad commissioners, and acting as such, afte'wards, and after the execution of said bond and coupons as aforesaid, and after the organization of said railroad company as aforesaid, and after the written assent of two-thirds of the resident persons taxed in said town of Venice had been obtained and filed as aforesaid, together with the affidavit required by section one of said act, to wit, on the first day of January, 1854, at the said town of Genoa, borrowed, on the faith and credit of said town , of Ashbel Avery the sum of one thousand dollars, for the purpose and in accordance with the provisions, and in virtue of said act of said legislature, and to secure the payment thereof with interest thereon, at the rate of seven per cent. per annum from the time of such borrowing, delivered the said bond No. 17, with the coupons hereinbefore mentioned thereto attached, and the said certificate of the clerk of the county of Cayuga hereinbefore mentioned thereon endorsed, to him, the said Ashbel Avery, the lender of said money, who thereby then and there became and was the owner, holder, and bearer thereof.

That afterwards, to wit, on the first day of January, 1857, at *the* Indianapolis, in said State of Indiana, they, the said plaintiffs, for a valuable consideration then paid by them therefor, purchased and became, and have ever since continued to be, and now are, the owners, holders, and bearers of said bond No. 17, together with the said coupons thereto attached, all of which then remained unpaid. And the said bond No. 17, with the said coupons attached, was thereupon then and there delivered to them, the said plaintiffs, and the same has ever since continued and remained, and still remains, in their possession as such owners, holders, and bearers thereof, and they, the said plaintiffs, thereby be-

came, and were, and still are, entitled to demand, have, and receive the monies due and remaining unpaid thereon, and also the monies thereafter to become due and payable thereon, when and as the same should thereafter become due and payable according to the terms and conditions thereof.

And the said plaintiffs aver that the said town of Genoa had not, at the time the moneys mentioned in said bond and in said several coupons became due and payable, nor has said town of Genoa at any time since had, at the said the Bank of the State of New York, in the said city of New York, or elsewhere, any money or means whereby the said several sums acknowledged by said town of Genoa to be due could be or would have been paid had a demand thereof been made when the same became due and payable, as provided in and by the terms of said bond and of said several coupons, nor at any time since; and although often requested so to do, the said town of Genoa has hitherto wholly refused, and still does refuse, to pay the said several sums in said coupons and said bond specified, and being the principal and interest which accrued upon said bond from the first day of January, 1854, to the first day of January, 1873, and which became due and payable to the owner of said bond and said coupons on said several days in that behalf hereinbefore specified. And said plaintiffs fu'ther aver that the whole of the said principal sum of one thousand dollars, together with the interest thereon from the first day of January, 1855, and the interest upon the several sums so as aforesaid mentioned in said several coupons from the time the same severally became due and payable, still remain due and unpaid; and said defendant, although often requested so to do, has hitherto wholly refused, and still does refuse, to pay the same, or any part there'f, to them, the said plaintiffs.

21 Tenth, And for a further and tenth cause of action the said plaintiffs further say and aver—

That heretofore, to wit, on the 16th day of April, 1852, an act was duly passed by the legislature of the State of New York, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehannah Railroad," whereby it was, amongst other things, enacted that it should be lawful for the supervisor of any town in the said county of Cayuga, and the assessors of such town, in said county, who were appointed by said act as commissioners to act in conjunction with said supervisor in effecting and executing the purposes of said act, to borrow, on the faith and credit of said town, such sum of money as they, said supervisor and assessors, might deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as might be agreed upon not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds, on which the interest should be made payable annually or semi-annually during the term said money might be borrowed, and the principal and interest of which loan should be made payable in such sums and at such times and place as should be agreed upon and expressed in the bonds duly executed under the authority of said act.

And wherein and whereby it was further enacted that said assessors, appointed to act as commissioners by section first of said act, should hold their office till the next annual town-meeting of their town, when it should be the duty of the electors of said town to elect by ballot, in the same manner that town officers were then elected, two commissioners, to be called "railroad commissioners," to act in conjunction with the

supervisor in carrying into effect the provisions of said act, and that the action of a majority of such supervisor and commissioners should at all times be sufficient for carrying into effect the provisions of said act.

That it was in said act further provided that the said supervisor and commissioners should have no power to do any of the acts authorized by said act until a railroad company had been duly organized, according to the requirements of the general railroad law, for the purpose of constructing the aforesaid described railroad, to wit, a railroad passing through the city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga Railroad or the New York and Erie Railroad, and until the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprise two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

That a railroad company, to wit, the Lake Ontario, Auburn and New York Railroad Company, was duly organized, to wit, on the 23d day of August, 1852, according to the provisions of the general railroad law of the State of New York, passed April 2d, 1850, for constructing, maintaining, and operating a railroad for public use in the conveyance of persons and property, commencing at some point on the Susquehannah and Cayuga Railroad, to wit, about seven miles from the village of Ithaca, in the county of Tompkins and State of New York, and extending thence to the city of Auburn, and thence to the termination of said railroad at Little Sodus Bay, in the town of Sterling, Cayuga County.

That the written assent of two-thirds of the resident persons taxed in said town of Genoa, as appeared on the assessment-roll of said town of Genoa made next previous to the time of borrowing the money authorized by said act, had been obtained in pursuance of said act, and filed in clerk's office of Cayuga County, together with the affidavit required by said act attached to said written assents and statement, to the effect that the persons whose written assents were thereto attached and filed as aforesaid comprised two-thirds of all the resident tax-payers of said town of Genoa on its assessment-roll next previous to the obtaining said written assents, before the execution and delivery of any bonds by said supervisor and commissioners of said town of Genoa.

That afterwards, to wit, on the 26th day of February, 1853, John King, who was then supervisor of said town of Genoa, and Allen Palmer and Amos Hurlburt, who were then the railroad commissioners of said town of Genoa, theretofore duly elected by the electors of said town of Genoa, according to said act, and by virtue thereof, under their several signatures duly executed a certain writing obligatory, or bond, of said town, bearing date the said 26 day of February, 1853, and numbered eighteen in the series of bonds executed under and in virtue of said act, whereby the said town of Genoa, in pursuance of said act of the legislature of the State of New York, acknowledged itself to owe, and promised to pay to the bearer of said bond No. 18, the sum of one thousand dollars, with interest at the rate of seven per cent. per annum, payable semi-annually on the first day of January and July in each year, on surrender of the coupons to said bond attached, at the Bank of the State of New York, in the city of New York, the principal to be re-imbursed at the same

place, at the expiration of twenty years from the first day of January, 1853.

That the said John King and Allen Palmer and Amos Hurlburt, as such supervisor and railroad commissioners as aforesaid, and under their official signatures, at the same time of the execution of said bond by them as aforesaid, to wit, on the said second day of March, 1853, duly attached to said bond No. 18 thirty-nine several coupons, or promises to pay, the semi-annual interest of thirty-five dollars each, which would become due and payable upon the expiration of each and every six months from and after the first day of January, one thousand
22 eight hundred and fifty-four, until the first day of January, one thousand eight hundred and seventy-three, each and every of which coupons was substantially in the following form, except the time of payment therein specified, to wit:

"$35. The town of Genoa, in the county of Cayuga, hereby acknowledges that there will be due the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York, on the first day of , being interest due on that day on bond No. 18."

That afterwards, and before said bond No. 18 was negotiated or delivered by said town of Genoa to any person, to wit, on the 22 day of August, 1853, the then clerk of said county of Cayuga, at the request of the said town of Genoa, made and endorsed upon bond No. 18 his certificate in writing, duly signed by him in his official character as such clerk of said county of Cayuga, whereby he, the said clerk, under his said official signature, certified that a paper purporting to be the written assent of two-thirds of the resident tax-payers of said town of Genoa, with the affidavit required by section one of the act referred to by its title in said bond, had been filed in said clerk's office.

That the said supervisor and railroad commissioners, and acting as such, afte'wards, and after the execution of said bond and coupons as aforesaid, and after the organization of said railroad company as aforesaid, and after the written assent of two-thirds of the resident persons taxed in said town of Venice had been obtained and filed as aforesaid, together with the affidavit required by section one of said act, to wit, on the first day of January, 1854, at the said town of Genoa, borrowed, on the faith and credit of said town , of Ashbel Avery, the sum of one thousand dollars, for the purpose, and in accordance with the provisions and in virtue of said act of said legislature, and to secure the payment thereof, with interest thereon at the rate of seven per cent. per annum from the time of such borrowing, delivered the said bond No. 18, with the coupons hereinbefore mentioned thereto attached, and the said certificate of the clerk of the county of Cayuga hereinbefore mentioned thereon endorsed, to him, the said Ashbel Avery, the lender of said money, who thereby then and there became and was the owner, holder, and bearer thereof.

That afterwards, to wit, on the first day of January, 1857, at Indianapolis, in said State of Indiana, they, the said plaintiffs, for a valuable consideration then paid by them therefor, purchased and became, and have ever since continued to be, and now are, the owners, holders, and bearers of said bond No. 18, together with the said coupons thereto attached, all of which then remained unpaid. And the said bond No. 18, with the said coupons attached, was thereupon then and there delivered to them, the said plaintiffs, and the same has ever since continued and remained, and still remains, in their possession as such owners, holders, and bearers thereof, and they, the said plaintiffs, thereby became and were, and still are, entitled to demand, have, and receive the

monies due and remaining unpaid thereon, and also the monies thereafter to become due and payable thereon, when and as the same should thereafter become due and payable, according to the terms and conditions thereof.

And the said plaintiffs aver that the said town of Genoa had not, at the time the moneys mentioned in said bond and in said several coupons became due and payable, nor has said town of Genoa at any time since had, at the said the Bank of the State of New York, in the said city of New York, or elsewhere, any money or means whereby the said several sums acknowledged by said town of to be due could be or would have been paid had a demand thereof been made when the same became due and payable, as provided in and by the terms of said bond and of said several coupons, nor at any time since; and although often requested to so to do, the said town of Genoa has hitherto wholly refused, and still does refuse, to pay the said several sums in said coupons and said bond specified, and being the principal and interest which accrued upon said bond from the first day of January, 1854, to the first day of January, 1873, and which became due and payable to the owner of said bond and said coupons on said several days in that behalf hereinbefore specified. And said plaintiffs fu'ther aver that the whole of the said principal sum of one thousand dollars, together with the interest thereon from the first day of January, 1855, and the interest upon the several sums so as aforesaid mentioned in said several coupons from the time the same severally became due and payable, still remain due and unpaid, and said defendant, although often requested so to do, has hitherto wholly refused, and still does refuse, to pay the same or any part there'f, to them, the said plaintiffs.

23 Eleventh. And for a further and eleventh cause of action the said plaintiffs further say and aver—

That heretofore, to wit, on the 16th day of April, 1852, an act was duly passed by the legislature of the State of New York, entitled, "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie or Cayuga and Susquehannah Railroad," whereby it was, amongst other things, enacted that it should be lawful for the supervisor of any town in the said county of Cayuga, and the assessors of such town, in said county, who were appointed by said act as commissioners to act in conjunction with said supervisor in effecting and executing the purposes of said act, to borrow, on the faith and credit of said town, such sum of money as they, said supervisor and assessors, might deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as might be agreed upon not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds, on which the interest should be made payable annually or semi-annually during the term said money might be borrowed, and the principal and interest of which loan should be made payable in such sums, and at such times and place as should be agreed upon and expressed in the bonds duly executed under the authority of said act.

And wherein and whereby it was further enacted that said assessors, appointed to act as commissioners by section first of said act, should hold their office till the next annual town meeting of their town, when it should be the duty of the electors of said town to elect by ballot, in the same manner that town officers were then elected, two commissioners, to be called "railroad commissioners," to act in conjunction with the supervisor in carrying into effect the provisions of said act, and that the

action of a majority of such supervisor and commissioners should at all times be sufficient for carrying into effect the provisions of said act.

That it was in said act further provided that the said supervisor and commissioners should have no power to do any of the acts authorized by said act until a railroad company had been duly organized, according to the requirements of the general railroad-law, for the purpose of constructing the aforesaid-described railroad, to wit: A railroad passing through the city of Auburn, and connecting Lake Ontario with the Susquehannah and Cayuga Railroad, or the New York and Erie Railroad, and until the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town made next previous to the time such money may be borrowed, shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga County, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereto attached and filed as aforesaid comprise two-thirds of all the resident tax-payers of said town on its assessment-roll next previous thereto.

That a railroad company, to wit, the Lake Ontario, Auburn and New York Railroad Company, was duly organized, to wit, on the 23d day of August, 1852, according to the provisions of the general railroad-law of the State of New York, passed April 2d, 1850, for constructing, maintaining, and operating a railroad, for public use, in the conveyance of persons and property, commencing at some point on the Susquehannah and Cayuga Railroad, to wit, about seven miles from the village of Ithaca, in the county of Tompkins, and State of New York ,and extending thence to the city of Auburn, and thence to the termination of said railroad at Little Sodus Bay, in the town of Sterling, Cayuga County.

That the written assent of two-thirds of the resident persons taxed in said town of Genoa, as appeared on the assessment-roll of said town of Genoa made next previous to the time of borrowing the money authorized by said act, had been obtained in pursuance of said act, and filed in clerk's office of Cayuga County, together with the affidavit required by said act attached to said written assents and statement, to the effect that the persons whose written assents were thereto attached and filed as aforesaid comprised two-thirds of all the resident tax-payers of said town of Genoa on its assessment-roll next previous to the obtaining said written assents, before the execution and delivery of any bonds by said supervisior and commissioners of said town of Genoa.

That afterwards, to wit, on the 26th day of February, 1853, John King, who was then supervisor of said town of Genoa, and Allen Palmer and Amos Hurburt, who were then the railroad commissioners of said town of Genoa, theretofore duly elected by the electors of said town of Genoa, according to said act and by virtue thereof, under their several signatures, duly executed a certain writing obligatory, or bond, of said town, bearing date the said 26 day of February, 1853, and numbered twenty in the series of bonds executed under and in virtue of said act, whereby the said town of Genoa, in pursuance of said act of the legislature of the State of New York, acknowledged itself to owe, and promised to pay, to the bearer of said bond No. 20 the sum of one thousand dollars, with interest at the rate of seven per cent. per annum, payable semi-annually on the first day of January and July in each year, on surrender of the coupons to said bond attached, at the Bank of the State of New York, in the city of New York, the principal to be re-imbursed at the same place at the expiration of twenty years from the first day of January, 1853.

That the said John King & Allen Palmer and Amos Hur'burt, as such supervisor and railroad commissioners as aforesaid, and under their official signatures, at the same time of the execution of said bond by them as aforesaid, to wit, on the said second day of March, 1853, duly attached to said bond No. 20 thirty-nine several coupons, or promises to pay, the semi-annual interest of thirty-five dollars each, which would become due and payable upon the expiration of each and every six months from and after the first day of January, one thousand
24 eight hundred and fifty-four, until the first day of January, one thousand eight hundred and seventy-three, each and every of which coupons was substantially in the following form, except the time of payment therein specified, to wit:

"$35. The town of Genoa, in the county of Cayuga, hereby acknowledges that there will be due the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York, on the first day of , being interest due on that day on bond No. 20."

That afterwards, and before said bond No. 20 was negotiated or delivered by said town of Genoa to any person, to wit, on the 22 day of August, 1853, the then clerk of said county of Cayuga, at the request of the said town of Genoa, made and endorsed upon bond No. 20 his certificate in writing, duly signed by him in his official character as such clerk of said county of Cayuga, whereby he, the said clerk, under his said official signature, certified that a paper purporting to be the written assent of two-thirds of the resident tax-payers of said town of Genoa, with the affidavit required by section one of the act referred to by its title in said bond, had been filed in said clerk's office.

That the said supervisor and railroad commissioners, and acting as such, afte'wards, and after the execution of said bond and coupons as aforesaid, and after the organization of said railroad company as aforesaid, and after the written assent of two-thirds of the resident persons taxed in said town of Venice had been obtained and filed as aforesaid, together with the affidavit required by section one of said act, to wit, on the first day of January, 1854, at the said town of Genoa, borrowed, on the faith and credit of said town, of Ashbel Avery the sum of one thousand dollars, for the purpose and in accordance with the provisions and in virtue of said act of said legislature, and to secure the payment thereof, with interest thereon at the rate of seven per cent. per annum, from the time of such borrowing, delivered the said bond No. 20, with the coupons hereinbefore mentioned thereto attached, and the said certificate of the clerk of the county of Cayuga hereinbefore mentioned, thereon endorsed, to him, the said Ashbel Avery, the lender of said money, who thereby then and there became and was the owner, holder, and bearer thereof.

That afterwards, to wit, on the first day of January, 1857, at Indianapolis, in said State of Indiana, they, the said plaintiffs, for a valuable consideration then paid by them therefor, purchased and became, and has ever since continued to be, and now are, the owners, holders, and bearers of said bond No. 20, together with the said coupons thereto attached, all of which then remained unpaid. And the said bond No. 20, with the said coupons attached, was thereupon then and there delivered to them, the said plaintiffs, and the same has ever since continued and remained, and still remains, in their possession as such owners, holder', and bearer' thereof, and they, the said plaintiffs, thereby became and were, and still are, entitled to demand, have, and receive the monies due and remaining unpaid thereon, and also the monies thereafter to become

due and payable thereon, when and as the same should thereafter become due and payable according to the terms and conditions thereof.

And the said plaintiffs aver that the said town of Genoa had not at the time the moneys mentioned in said bond and in said several coupons became due and payable, nor has said town of Genoa at any time since had, at the said the Bank of the State of New York, in the said city of New York, or elsewhere, any money or means whereby the said several sums acknowledged by said town of Genoa to be due could be or would have been paid had a demand thereof been made when the same became due and payable, as provided in and by the terms of said bond and of said several coupons, nor at any time since; and although often requested so to do, the said town of Genoa has hitherto wholly refused, and still does refuse, to pay the several sums in said coupons and said bond specified, and being the principal and interest which accrued upon said bond from the first day of January, 1854, to the first day of January, 1873, and which became due and payable to the owner of said bond and said coupons on said several days in that behalf hereinbefore specified. And said plaintiffs fu'ther aver, that the whole of the said principal sum of one thousand dollars, together with the interest thereon from the first day of January, 1856, and the interest upon the several sums so as aforesaid mentioned in said several coupons from the time the same severally became due and payable, still remain due and unpaid; and said defendant, although often requested so to do, has hitherto wholly refused, and still does refuse, to pay the same, or any part there'f, to them, the said plaintiffs.

Wherefore, the plaintiffs demand judgment against said town of Venice for the principal and interest due, and to grow due, upon said several bonds and the coupons thereto attached, to the amount of thirty thousand dollars, together with the costs of this action.

D. WRIGHT,
Plaintiffs' Attorney, Auburn, N. Y.

24[2] (Indorsed:) United States circuit court, northern dist. N. Y. James O. Woodruff and Daniel Macauley vs. The Town of Venice. Declaration or complaint. D. Wright, plffs.' attorney, Auburn, N. Y. Filed January 14, 1873.

25 And afterwards, to wit, on the 28th day of April, 1873, the said defendant appeared in said action, by Warren A. Worden its attorney, and on the 30th day of April, 1873, filed its answer to the said declaration or complaint of the said plaintiffs; which said answer was and is in the words and figures following, to wit:

26 Circuit court of the United States, northern district of New York.

JAMES O. WOODRUFF AND DANIEL MACAULEY
ag'st
THE TOWN OF VENICE.

And the said town of Genoa, the defendant above named, by Warren A. Worden, its attorney, comes and defends this action, and says it denies the whole of the plaintiffs' complaint or declaration herein, and each & every allegation therein contained, except it admits the passage, on the 16th day of April, 1852, of the act of the legislature of the State of New York & the organization of the railroad company mentioned & referred to in said complaint.

Second. And for a further and second defence herein the said defendant says that the said plaintiff' ought not to have or maintain this action herein against this defendant, because it says that this defendant, the town of Genoa, is not a citizen, but one of the political & civil divisions of the State of New York, and that this court has no
27 jurisdiction of this defendant, the town of Genoa.

Third. And for a third & further defence herein the said defendant says that the said plaintiffs ought not to have or maintain this their aforesaid action thereof against this defendant, to recover the said several sums of money alleged in said complaint to have accrued by way of interest upon said alleged bonds & coupons in said complaint mentioned on or prior to the first day of January, eighteen hundred and sixty-seven, because it says the same did not, nor did any or either of them or any part or portion thereof, accrue or become due & payable within six years next before the commencement of this suit; and as to the remaining portion of said seve'al sums of money in the said complaint mentioned, the said defendant says it does not owe the same, or any or either of them, or any part or portion thereof, either in manner & form as is stated and set forth in the said plaintiffs' complaint, or otherwise.

28 Fourth. And for a further and fourth defence herein the said defendant says that the said plaintiffs ought not to have or maintain this their aforesaid action thereof against this defendant, because it says that the said several supposed causes of action in the said plaintiffs' complaint mentioned did not, nor did any or either of them, accrue to the said plaintiff at any time within six years before the commencement of this suit in manner & form as the said plaintiffs have above thereof complained against this defendant, or otherwise.

Fifth. And for a further and fifth defence herein the said defendant says that the said plaintiffs ought not to have or maintain this action against this defendant, because it says that the said several supposed bonds & coupons in said complaint mentioned & referred to are not now, any or either of them, the deed, obligation, promise, or undertaking of this defendant in any way or manner, or for any cause whatsoever.

Sixth. And for a further and sixth defence herein this defendant says that the said plaintiff ought not to have or maintain this action
29 herein against this defendant herein, because it says that the supervisor and assessors of the said town of Genoa, in office when said act of the legislature of the State of New York in said complaint mentioned was passed and became a law, did not, nor did any or either of them, or any officer or officers of said town, or any other person or persons whomsoever, ever obtain or file in the clerk's office of Cayuga County the written assent of two-thirds of the resident persons taxed in said town, as appeared on any assessment-roll of said town whatsoever, as required by said act, and that the said town of Genoa never was authorized or empowered, in any way or manner, or for any cause or purpose whatsoever, nor was any person or persons, officer or officers, of said town, or otherwise, ever authorized or empowered, in any way or manner whatsoever, or for any cause or purpose whatsoever, to borrow any money, or to execute or deliver for the said town of Genoa the said several alleged bonds & coupons in said complaint mentioned, or any or either of them, in any way or for any cause or purpose whatsoever, and that said several bonds & coupons are illegal and void, and of no force or effect whatsoever, & impose no obligation

30 on or by said town of Genoa, in any way or for any cause whatsoever.

Seventh. And for a further and seventh answer and defence herein the defendant says that the said plaintiffs ought not to have or maintain against this defendant, because it says that the supervisor and assessors of said town of Genoa, in office when said act of the legislature of New York first mentioned and referred to in said complaint or declaration was passed and became a law, did not, nor did any or either of them, or any officer or officers of said town, or any other person or persons whomsoever, ever make or file in the office of the clerk of Cayuga County any affidavit to the effect that the persons whose written assents are thereto attached & filed as aforesaid, to wit, in the office of said clerk, comprise two-thirds of all the resident tax-payers of said town on its assessment-roll previous thereto, as required by said act, and that therefore the said town of Genoa never was authorized or empowered, nor was any person or persons, officer or officers, ever authorized or empowered to borrow any money on the faith and credit of said town, or the faith &
31 credit of said bonds & coupons in said declaration or complaint mentioned, in any way whatsoever, or to execute or deliver said bonds & coupons in said declaration or complaint mentioned & referred to, or any or either of them, and that the same are therefore illegal & void.

Eighth. And for a further & eighth defense and answer herein this defendant says that the said plaintiff ought not to have or maintain this action herein against this defendant, the said town of Genoa, because it says that the said John King, Allen Palmer, & Amos Hurlburt, in said declaration or complaint mentioned, never were, nor were any or either of them ever, the agents of the said town for the purpose of executing or delivering for said defendant the said several supposed bonds & coupons in said declaration or complaint mentioned, or any or either of them, in any way or for any cause or purpose whatsoever. * Nor had they, or any or either of them, any authority or power in any way, or for any cause or purpose whatsoever*, to execute or deliver for said town the said several supposed bonds & coupons in said declaration or complaint mentioned, or any or either of them.

Ninth. And for a further and ninth defense & answer herein
32 this defendant says that the said plaintiffs ought not to have or maintain this action against this defendant, because it says that the first instalment of interest secured & agreed to be paid in and by the said supposed bonds, & each and every one of them, is made payable within a term less than six months from the date of them, & each of them to wit, within the term of four months and twenty-six days from the date of them, & each of them, & that the interest secured to be paid in and by said bonds, & each of them, exceeds the sum of seven per cent. per annum.

Tenth. And for a further & tenth defense & answer herein this defendant says that the said plaintiff ought not to have or maintain this action against this defendant, because it says that the said supposed bonds & coupons in said declaration or complaint mentioned were not, nor were any or either of them, ever executed or delivered for any money borrowed or agreed to be borrowed on the faith and credit of said town of Genoa, but on the contrary thereof this defendant says that said supposed bonds & coupons, and each and every one of them, were de-
33 livered to the Lake Ontario, Auburn and New York Railroad Company, mentioned and referred to in said declaration & complaint, for stock in said road and for money borrowed or agreed to be borrowed,

and which was the first & only delivery of said bonds & coupons in any way or for any cause or purpose whatsoever, and that such negotiations & delivery was without authority and unauthorized, and was & is illegal & void, and in violation of the requirements & conditions of the said act of the legislature of the State of New York above mentioned and referred to, and that from and after that time the same remained in the sole & only possession & control of the said railroad company, or its assigns; the said town or any officer thereof never having repossessed itself or themselves of the same in any way or for any cause whatsoever, and that at the time when the said plaintiff became the owner, holder, & bearer of the said bonds & coupons there was due and unpaid on each of said alleged bonds, with said coupons which were attached to the same respectively, a large sum of money, to wit, the sum of eight
34 hundred dollars or thereabouts, for interest then due and unpaid on said bonds & coupons, and that the said plaintiffs, at the time when he became such owner, holder, & bearer of said bonds & coupons, well knew that such interest was due and unpaid on the same respectively, and that the said plaintiffs became such owner, holder, & bearer of said bonds & coupons respectively not in the ordinary course of business, and without such knowledge as aforesaid, & without paying a bona fide & valuable consideration for the same, & with full knowledge of the original delivery of them to the said railroad company as aforesaid, and that the said plaintiffs are not a bona-fide owner, holder, or bearer of them, or any or either of them, for a valuable consideration paid by him & in the ordinary course of business.

Wherefore the said defendant demands judgment herein, & that the said plaintiffs' complaint or declaration herein be dismissed with costs, &c.

WARREN A. WORDEN,
Defts. Atty., Auburn, N. Y.
WARREN T. WORDEN,
Of Counsel for said Defendant, the Town of Genoa.

35 Circuit court of the United States, second circuit, northern district of New York.

JAMES O. WOODRUFF AND DANIEL MACAULEY
ag'st
THE TOWN OF GENOA.

UNITED STATES, NORTHERN DISTRICT OF NEW YORK,
State of New York, Cayuga County, ss:

Arvid Moshier, of the town of Genoa, in said county, being duly sworn, deposeth and says that he is the supervisor of said town of Genoa, & that he has fully and fairly stated this case & the grounds of the defendant's defence herein to Warren A. Worden, of Auburn, in said county, and one of the defendant's counsel herein, & that the said defendant has a good & substantial defence upon the merits in this action, as he is advised by said counsel, and verily believes to be true.

ARVID MOSHIER.

Sworn & subscribed to before me this 22nd day of April, 1873.
CHARLES L. ADAMS,
U. S. Commissioner, Northern District of New York.

36 I hereby certify that I have advised Arvid Moshier, above named, that the above-named defendant has a good and sub-

substantial defence on the merits in said action, as stated in the above affidavit of the said Arvid Moshier; and I further certify that the above & foregoing answers & pleas, & each & every of them, are, in my opinion, well founded.

Dated Auburn, April 22d, 1873.

WARREN A. WORDEN,
Attorney and Counsel for said Defendant, the Town of Genoa.

(Indorsed:) Circuit court of the United States, northern district of New York. James O. Woodruff and Daniel Macauley ag'st the town of Genoa. Defendant's answer. Warren A. Worden, defts. atty., Auburn, N. Y. Filed April 30th, 1873.

37 And therefore the issue above joined came on to be tried at the June term of said court, held at the village of Canandaigua on the 19th day of June, A. D. 1873, before the honorable Ward Hunt, justice, and a jury, at which day and place last aforesaid came the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury summoned to try the said issue, being empannelled and sworn, after hearing the evidence offered in said cause, say, upon their oaths, that the said defendant is guilty of the premises above laid to its charge, in manner and form as the said plaintiffs have above complained against it, and they assess the damages of said plaintiffs by reason of the premises, over and above their costs and charges by them about their suit in this behalf expended, to seventeen thousand one hundred and sixty-eight dollars and sixty cents.

38 At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the village of Canandaigua on Thursday, the 19th day of June, in the year of our Lord one thousand eight hundred and seventy-three.

Present, the honorable Ward Hunt, justice.

JAMES O. WOODRUFF AND DANIEL MACAULEY
vs.
THE TOWN OF GENOA.

On motion of Warren T. Worden, counsel for defendant, ordered that the defendant have sixty days in which to make and serve a bill of exceptions, and that the plaintiffs have the same time to prepare amendments thereto, and that in the mean time all other proceedings be stayed.

39 Therefore, it is considered that the said plaintiffs, James O. Woodruff and Daniel Macauley, do recover against the said defendant, the town of Genoa, their said damages by the jurors aforesaid, in form aforesaid, assessed, and also three hundred and sixty-two dollars and seventy-four cents for their costs and charges by the court here adjudged, of increase to the said plaintiffs, with their assent, which said damages, costs, and charges, in the whole, amount to seventeen thousand five hundred and thirty-one dollars and thirty-four cents.

And said defendant in mercy, &c.

Judgment signed this 15th day of September, A. D. 1873.

CHARLES MASON, *Clerk.*

(Indorsed:) U. S. circuit court, north. dist. of N. Y. James O. Woodruff and Daniel Macauley vs. The Town of Genoa. Judgment record. David Wright, pltfs.' att'y. Damages, $17,168.60; costs, $362.74—$17,531.34. Filed September 15th, 1873, 5 o'clock p. m.

40 *Bill of exceptions on behalf of the defendant.*

Circuit court of the United States, second circuit, northern district of New York.

THE TOWN OF GENOA
ads.
JAMES O. WOODRUFF AND DANIEL MACAULEY.

Afterwards, to wit, at a circuit court held at the village of Canandaigua, in and for the northern district of New York, the State of New York, on the seventeenth day of June, one thousand eight hundred and seventy-three, by and before the Hon. Ward Hunt, one of the associate justices of the Supreme Court of the United States, came the parties aforesaid, by their attorneys aforesaid, and also by their respective counsel, and the issues thus joined came on to be tried by and before said judge and a jury; and the said plaintiffs, in order to maintain the issues on their part, produced and read in evidence an act of the legislature of the State of New York, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the con-
41 struction of a railroad or railroads from Lake Ontario to the New York and Erie, or Cayuga and Susquehannah Railroad," passed April 16, 1852.

The plaintiffs then produced and read in evidence a certified copy of the articles of incorporation of the Lake Ontario, Auburn and New York Railroad Company, mentioned and referred to in the pleadings in this cause, which articles of association provided for the construction and operation of a railroad from some point on Little Sodus Bay, in the county of Cayuga and State of New York, passing through the towns of Sterling, Victory, city of Auburn, and towns of Fleming, Scipio, Venice, and Genoa, in said county of Cayuga, and into the county of Tompkins, in said State of New York, to a point on the Cayuga and Susquehannah Railroad, in said county of Tompkins, about seven miles from Ithaca.

The plaintiffs then produced the several alleged bonds, coupons, & clerk's certificate, mentioned and referred to in the complaint or declaration in this cause, and proved that the signatures to the
42 same were genuine, and that John King was supervisor and Allen Palmer and Amos Hulbert railroad commissioners of said town at the time when said alleged bonds were executed.

The counsel for said plaintiffs then offered to read the said certificate of the clerk of Cayuga County in evidence, under the hand of said clerk, endorsed on each of said bonds, and to which the counsel for said defendant then and there objected, because there was no statute or rule of law of said State authorizing or empowering the clerk to make any such certificate. His honor the judge overruled said objection, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted. The said certificate was then read in evidence in the words and figures following, to wit:

"CAYUGA COUNTY, CLERK'S OFFICE.

"I, Edwin B. Marvine, clerk of the county of Cayuga, hereby
43 certify that a paper purporting to be the written assent of two-thirds of the resident tax-payers of the town of Genoa, with the affidavit required by sec. 1 of the act referred to by its title in the foregoing bond, has been filed in this office.

Dated Auburn, May 21, 1853.

(Signed)

"E. B. MARVINE, *Clerk.*"

The counsel for said plaintiffs then called as a witness one LYMAN C. COMSTOCK, who, being duly sworn, testified as follows:

I am clerk of Cayuga County. I have with me from the files of said office the assents and affidavit annexed in the case of the town of Genoa. They were filed in said office on the thirtieth day of September, 1852, and of which said assents the following is a copy:

"We, the undersigned, resident tax-payers of the town of Genoa, in the county of Cayuga, do hereby consent that the supervisor and assessors of said town may borrow, on the faith and credit of said town, such a
44 sum of money as they may deem necessary, not exceeding twenty-five thousand dollars, for a term not exceeding twenty years, at such rate of interest as may be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signature, a bond or bonds in which the interest shall be made payable annually or semi-annually during the term said money may be borrowed, and the principal and interest made payable in such sums and at such times and places as shall be agreed upon and expressed in the bonds to be executed; and that the moneys so borrowed may be paid to the president and directors of a railroad company, organized according to the requirements of the general railroad law, for the purpose of constructing a railroad connecting Lake Ontario with the Susquehannah and Cayuga Railroad, and passing through the city of Auburn, upon the stock of said railroad com-
45 pany to be subscribed for and taken by said supervisor and assessors in the name of said town."

There is endorsed on said assents an affidavit, of which the following is a copy:

STATE OF NEW YORK,
Cayuga County, ss:

John King, supervisor of the town of Genoa, in said county, Allen Palmer, Stephen Fessenden, and Amos Hulbutt, the assessors of said town, being duly sworn, say, and each for himself says, that the several persons whose written assents are hereto attached, comprise two-thirds of all the resident tax-payers of said town of Genoa on its assessment-roll made and completed next previous to the date hereof.

Dated Genoa, September 11, 1852.

JOHN KING.
ALLEN PALMER.
STEPHEN FESSENDEN.
AMOS HURLBUTT.

Subscribed and sworn to before me this 29th day of September, 1852.

HERMAN HOLDEN,
Justice of the Peace, Cayuga County.

46 And the counsel for said plaintiffs then offered to read said assents and said affidavits in evidence, and to which the counsel for said defendant objected, on the ground that said plaintiffs must first prove that the signatures to said assents are the genuine signatures of those whose names purport to be signed to the same, and which objection was then and there overruled by said court, and to which ruling and decision the counsel for said defendants then and there, in due time and form, excepted, and the same was then and there duly noted by said court, and the said assents, the heading thereto, and the said affidavit was then and there read in evidence by said counsel for said plaintiffs.

The counsel for said defendant also in due time objected to the reading of the affidavit in evidence, on the ground that the same was not legitimate proof in the cause, and also because the word "filed"
47 was not in said affidavit, the said affidavit not averring that the assents thereto attached and filed as aforesaid compose two-thirds of the resident tax-payers of said town as appeared on any assessment roll of said town as required by said statute; but his honor the judge overruled said objection, and to which ruling and decision the counsel for said defendants then and there excepted, and the same was then and there duly noted by the court; and the said assents, and the heading thereto, and said affidavit were then and there read in evidence by said counsel for said plaintiffs.

The counsel for said plaintiffs then offered to read in evidence the said several bonds, with the coupons thereto attached as mentioned and referred to in said complaint, and to which the counsel for the defendant objected, and contended that the alleged bonds having been issued under a special statute, and that statute having pointed out and provided the mode and manner by which the money should be raised with
48 which to pay them; that said statute formed a part and portion of the alleged bonds, as much so as if the same was incorporated in them, and that the payment of the same must be enforced in the mode and manner pointed out by the statute, and that this action could not be maintained. His honor the judge overruled said objection, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there duly noted by the court.

The counsel for the defendant then and there objected to the reading of said bonds and coupons in evidence, unless it was proved that the signatures to said alleged assents of the alleged tax-payers of said town, as filed in the clerk's office of Cayuga County were genuine, and, in fact, signed by the persons whose names were attached to the same, and that they could not be proved by said affidavit; but his honor the judge overruled said objection, and to which ruling and decision
49 the counsel for said defendant then and there excepted, and the same was then and there duly noted by the court.

The counsel for said defendant then and there objected to the reading of said bonds and coupons in evidence, because the affidavit did not conform to the requirements of the statute as above mentioned. But his honor the judge overruled said objection, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted by the court.

The counsel for said defendant then and there contended and insisted that, until the genuineness of the signatures to said alleged assents were proved in some way, other than by said affidavit, there was no evidence that the said John King, Allen Palmer, and Amos Hurlbutt had any power or authority to execute or deliver said alleged bonds or do anything under said act; but his honor the judge overruled said objection, and to which ruling and decision the counsel for said
50 defendant then and there excepted, and the same was then and there duly noted by the court.

The counsel for said defendant then and there contended that the said John King, Allen Palmer, and Amos Hurlbutt could not become agents of said town under said act for the purpose of executing said alleged bonds prior to the obtaining and filing of the assents, as required by said act, and until after such assents had been obtained and filed as aforesaid, and that the said plaintiffs were bound in some way to prove,

other than by the production of said affidavit by the clerk of Cayuga County from the files of said office, that the signatures to said assents were genuine, and signed or authorized to be signed by the persons whose names appear to be thereto attached. But his honor the judge decided otherwise and overruled said objection, and to which ruling and decision the counsel for said defendant then and there excepted,
51 and the same was then and there duly noted by the court.

The counsel for said defendant also then and there contended and insisted that the recitals in said alleged bonds, or in the testatum clause to said alleged bonds, were not evidense that the prior conditions required by said act to the issuing of said bonds had been complied with; that the right, power, and authority of said John King, Allen Palmer, and Amos Hurlbutt to execute said alleged bonds could not be proved by the recitals in said bonds or in said testatum clause to said bonds; that under the act in question they could not prove their own power and authority to execute or issue the same by recitals which they themselves should insert in said bonds or in said testatum clause to the bonds which they themselves should execute; and, if so, that the same were not
52 sufficient for that purpose; but his honor the judge decided otherwise, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there duly noted by said court.

The counsel for said defendant then objected to the reading of the said alleged bonds in evidence, because by the terms of said bonds the first installment or payment of interest was made payable in a less term than six months after the date of said bonds, to wit, on the first day of July thereafter, and that, therefore, they did not conform to the requirements and conditions of said act, and were therefore not such bonds as were authorized by the act in question; but his honor the judge overruled said objection, and decided that said bonds were in conformity with the requirements and conditions of the statute in question, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there duly noted by said court.

53 The counsel for said defendant then objected to the reading of the said several alleged bonds and coupons in evidence, because that, by making seven per cent. interest payable every six months, the interest secured to be paid in and by the same exceeded seven per cent. per annum; but his honor the judge overruled said objection, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there duly noted.

The counsel for said defendant then and there objected to the reading of said alleged bonds and coupons in evidence, unless it was proved that they were executed and delivered for money borrowed; but his honor the judge overruled said objection, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted.

The said several objections to the reading of said bonds and coupons in evidence having been overruled and excepted to as aforesaid,
54 the counsel for said plaintiffs then produced the said several bonds, with the several semi-annual-interest coupons thereto attached, from July first, eighteen hundred and fifty-six, to January first, eighteen hundred and seventy-three; and the said several bonds were then read in evidence, together with the interest-coupons, which had become due and payable within six years next previous to the commencement of this suit.

The plaintiffs then offered to read in evidence the said interest-coupons, which had become due and payable prior to that date, to wit: from the first day of July, eighteen hundred and fifty-six, up to and within six years next before the commencement of this suit; to which the counsel for said defendant objected, on the ground that under the pleadings, the statute of limitations having been pleaded, the plaintiffs were not entitled to recover interest beyond six years next prior
55 to the time of the commencement of this suit. His honor the judge then and there decided that said coupons might be read, (and they were read,) but that under the plea of the statute of limitations but six years interest could be recovered. To which ruling and decision the counsel for said plaintiffs then and there excepted, and the same was then and there noted. The counsel for said plaintiffs then offered to prove that on the fifth day of December, eighteen hundred and sixty-six, a former supervisor signed a stipulation or agreement that so long as no action should be commenced upon any one of said bonds, the statute of limitations should be in abeyance, so far as any interest-coupons which had theretofore become due upon said bonds was concerned; and to which the counsel for the defendant objected, on the ground that the said supervisor had no power or authority to bind said town by any such stipulation or agreement. His honor the
56 judge sustained said objection and excluded the proof, and to which ruling and decision the counsel for said plaintiff excepted, and the same was then and there noted.

The counsel for said plaintiffs then contended that the said plaintiffs had a right to recover interest upon each coupon to which the statute of limitations did not apply, from the time when it became due up to the day of the trial of this suit, and to which the counsel for said defendant then and there objected, and contended that the said plaintiffs could only recover simple interest, and could not compound the same by casting interest upon interest; but his honor, the judge, decided otherwise, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted.

The said bonds were exact duplicates of each other, except as to their numbers, one being numbered 4, and the others being numbered 10, 11, 12, 13, 14, 15, 16, 17, 18, and 20, and a copy of one of which said
57 bonds is hereunto annexed, marked "Schedule A." The interest coupons were also exact copies of each other, except as to the time of payment and the number of the bonds to which they were attached, a copy of one of which said coupons is hereunto annexed, marked "Schedule B."

The counsel for said plaintiffs then offered to prove the interest which had accrued upon each of said bonds, cast at seven per cent. per annum, simple interest, from the first day of July, eighteen hundred and fifty-six, (no interest being claimed prior to that date.) to the time of trial, and to which the counsel for the defendant objected, upon the ground that the plaintiffs could not be allowed to recover interest for more than six years prior to the commencement of this action; and said court then and there so decided, and refused to allow the proof thus offered to be made, to which ruling and decision the counsel for said plaintiffs then and there, in due time and form, excepted, and said exception was then and there duly noted by said court.

58 The plaintiffs then proved the interest and principal of said bonds, according to the ruling aforesaid, to be seventeen thousand one hundred and sixty-eight dollars and sixty cents, and rested.

The counsel for said defendant then asked the court to rule and decide

that on the above proof the plaintiffs were not entitled to recover; but his honor, the judge, declined so to rule or decide, but, on the contrary thereof, ruled and decided that on the facts above proved the plaintiffs were entitled to recover; and to which ruling and decision the counsel for said defendant excepted, and the same was then and there noted.

The counsel for said defendant then offered to show that the bonds in suit were originally and in the first instance delivered to the rail-road company mentioned in the pleadings for stock, and not for money borrowed; and to which the counsel for said plaintiffs then and
59 there objected, and the court sustained said objection, and excluded the testimony; and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted.

The counsel for said defendant then offered to show that Benjamin Gould, esq., of Cayuga County, was the owner and holder of the bonds now in suit, in eighteen hundred and fifty-four, and continued to be the owner and holder of them until some time on or about the first day of September, eighteen hundred and sixty-seven, when he disposed of the same, but not to these plaintiffs; and to which the counsel for said plaintiffs then and there objected, and his honor, the judge, sustained the objection and excluded the evidence thus offered; and to which ruling and decision the counsel for the defendant then and there excepted, and the same was then and there noted.

The said defendant then offered to prove that the said Benja-
60 min Gould commenced an action against the said town of Genoa, in the supreme court of the State of New York, some time on or about the ninth day of August, eighteen hundred and fifty-eight, on said bonds, to recover the interest then unpaid on the same; and that such proceedings were thereupon had in said action that a judgment was rendered against said town for the said interest then due and unpaid on said bonds, and from which judgment the said town appealed to the court of appeals of said State, where said judgment was *recovered* [reversed], and at the same time that the case of Starin *vs.* The Town of Genoa was reversed, as reported in the 23d of New York Reports, 439, &c., and for the same reasons; and that said Gould then discontinued and withdrew said suit, and disposed of said bonds, but not to these parties; and to which the counsel for said plaintiffs then and there objected,
61 and his honor, the judge, sustained the objection, and excluded the proof offered; and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted.

The counsel for said defendant then and there contended and insisted that the proofs thus offered, if admitted in evidence, would change the burden of proof and compel the plaintiffs to prove that they were in fact *bona-fide* holders for value of said bonds, and that under such proof and the circumstances of this case the mere production of said bonds by them did not prove that fact; but his honor, the judge, decided otherwise; and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted.

The counsel for said defendant then offered to show that some of the signatures to said assents were not genuine, and that others were
62 duplicates, and that, in point of fact, the same never were signed by two-thirds of the resident tax-payers of said town as required by said act, and to which the counsel for said plaintiffs objected, and his honor, the judge, after expressing great doubts on the subject, concluded to, and did, exclude the evidence thus offered; and to which

ruling and decision the counsel for said defendant then and there excepted, and the same was then and there duly noted by said court. The counsel for said defendant then referred to the general statutes of the State of New York, under and by virtue of which it was claimed that the said town of Genoa was incorporated, and contended that the said town was not such a corporation as made it a citizen of the State of New York, but was a part and portion of the machinery of the State government, and not a citizen of the State, and that this court has no jurisdiction over it or in this matter, but his honor, the judge,
63 decided otherwise, and to which ruling and decision of his honor, the judge, the counsel for said defendant then and there excepted, and the same was then and there noted.

Here the testimony closed.

The counsel for said defendant then requested his honor, the judge, to charge the jury that on the above proofs the plaintiffs were not entitled to recover. His honor, the judge, declined so to charge the jury; and to which refusal the counsel for said defendant then and there excepted, and the same was then and there noted by the court. His honor, the judge, then charged the jury that the plaintiffs, on the above proofs, were entitled to recover the principal secured to be paid by said several bonds, together with the interest thereon from the first day of January, eighteen hundred and seventy-three to the time of trial, together with the amounts specified in the several coupons which
64 became due and payable within six years previous to the commencement of this suit, together with interest upon said several coupons from the times the monies thereon severally specified became due and payable to the time of trial. To which charge the counsel for said plaintiffs then and there, in due time and manner, excepted, and requested the said court to charge said jury that said plaintiffs were entitled to recover the principal monies secured by said several bonds, together with simple interest thereon from the first day of July, one thousand eight hundred and fifty-six, to the time of trial; but said court refused to charge as thus requested, or in any wise to alter or vary the charge as theretofore made and given as above mentioned; and to which charge as given, and to said refusal to charge as requested, said counsel for said plaintiffs then and there duly excepted, and said exception was then and there duly noted by said court.

The counsel for said defendant also then and there, and in due
65 time and manner, excepted to so much of said charge whereby the said judge charged the jury that the said plaintiffs were entitled to recover the principal secured to be paid by said several bonds, together with the interest thereon from the first day of January, one thousand eight hundred and seventy-three, to the time of trial, and which said exception was then and there duly noted by said court.

The counsel for said defendant then and there, and in due time and manner, excepted to so much of such charge whereby the said judge charged said jury that the said plaintiffs were entitled to recover interest upon said several coupons from the time the monies therein severally specified became due and payable to the time of trial; and which said exception was then and there duly noted by said court.

The jury then, under the direction of the court as aforesaid, and
66 without retiring from said court, found their verdict for the plaintiff for the said sum of seventeen thousand one hundred and sixty-eight dollars and sixty cents.

And because none of the said exceptions, offers, or requests, and ex-

ceptions so offered, made, and excepted to, as aforesaid, to the rulings, opinions, and decisions of the said judge do appear upon the record of the said trial, therefore, on the prayer of the said defendant, by his said counsel, his honor the judge hath to this bill of exceptions set his hand and seal, according to the statute and the rules and practice of this court in such case made and provided, this twelfth day of September, one thousand eight hundred and seventy-three.

WARD HUNT, [L. S.]
Asso. Just. Sup. C't, U. S.

WARREN A. WORDEN,
Def't's Atty., Auburn, N. Y.
WARREN T. WORDEN,
Of Counsel.

67 SCHEDULE A.

No. 4. (Over.)

STATE OF NEW YORK,
County of Cayuga:

Seven per cent. loan, not exceeding $25,000.

Be it known that the town of Genoa, in the county of Cayuga and State of New York, in pursuance of an act of the legislature of the said State, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie, or Cayuga and Susquehannah Railroad," passed April 10th, 1852, and for the purpose of aiding the construction of the Lake Ontario, Auburn and New York Railroad, owes and promises to pay to Ashbel Avery or bearer one thousand dollars, with interest at the rate of seven per cent., payable semi-annually, on the first days of January and July in each year, on surrender of the coupons hereto attached, at the Bank of the State of New York, in the city of New York, the principal to be re-imbursable at the
68 same place at the expiration of twenty years from the first day of January, 1853.

In testimony whereof the supervisor and commissioners of the town of Genoa have, pursuant to the provisions of the act aforesaid and the written assent of two-thirds of the resident tax-payers of said town, obtained and filed in the office of the clerk of the county of Cayuga, hereunto subscribed their names this twenty-sixth day of February, A. D. 1853.

JOHN KING,
Supervisor.
ALLEN PALMER,
AMOS HURLBUTT,
Commissioners.

CAYUGA COUNTY, CLERK'S OFFICE.

I, Edwin B. Marvine, clerk of the county of Cayuga, hereby certify that a paper purporting to be the written assent of two-thirds of the resident tax-payers of the town of Venice, with the affidavit required by sec. 1 of the act referred to by its title in the foregoing bond,
69 has been filed in this office.
Dated August 22, 1853.

E. B. MARVIN,
Clerk of Cayuga County.

SCHEDULE B.

$35.

The town of Genoa, in the county of Cayuga, hereby acknowledges that there will be due the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York, on the first day of January, eighteen hundred and seventy-three, being interest due on that day on bond No. 4.

J. KING,
Supervisor.
A. PALMER,
A. HURLBUTT,
Commissioners.

(Indorsed:) Circuit court United States, second circuit, northern district of New York. The Town of Genoa ads. James O. Woodruff and Daniel Macauley, defendants. Bill of exceptions. Warren A. Worden, def't's atty. Auburn, N. Y. Filed September 12, 1873.

70 STATE OF NEW YORK, UNITED STATES OF AMERICA,
Northern District of New York, Cayuga Co., ss:

On this eighteenth day of September, 1873, before me, the subscriber, appeared personally Norman B. Atwater, Jason G. Atwater, Philo Clark, Daniel Valentine, and Samuel G. Fessenden, to me personally known to be the same persons described in, and who executed, the annexed and following instrument or bond, and acknowledged that they executed the same.

[NOTARIAL SEAL.] SAMUEL ADAMS.
Notary Public in & for Cayuga County, New York.

STATE OF NEW YORK, UNITED STATES OF AMERICA,
Northern District of New York, Cayuga County, ss:

On this day of September, 1873, before me, the subscriber, appeared personally

to me personally known to be the same persons described in, & who executed, the annexed and following instrument or bond, & acknowledged that they executed the same.

71 Know all men by these presents that we, Arvid Mosher, Alfred Lanterman, John Jackson, John Stephenson, Stephen Fessenden, Sidney Coon, William Mallison, Calvin Jump, Marquis D. King, Lucius A. Goodyear, Edmund P Shaw, Brainerd Lyon, George F. King, Irvin Mead, Thomas R. Goodyear, Wilson Merritt, Lucien B. King, Adonijah Yillotson, Charles E. Kendall, John L. King, Henry McGuigan, Arthur E. Slocum, Henry Chase, Edmund Brownell, Ezra C. Slocum, Isaac Peck, Netus Jump, Edwin A. Avery, Norman B. Atwater, Jason G. Atwater, Philo Clark, David Valentine, and Samuel C. Fessenden, all of the town of Genoa, in the county of Cayuga & State of New York, are held & firmly bound unto James C. Woodruff & Daniel Macauley in the penal sum of thirty-seven thousand two hundred & fifty dollars, for which payment, well & truly to be made, we bind ourselves, & our executors & administrators, jointly & severally, firmly by these presents.

In witness whereof we have hereunto set our hands & seals, this sixteenth day of September, one thousand eight hundred & seventy-three.

Whereas the town of Genoa, in the county of Cayuga, State of New York, is about to prosecute a writ of error from the Supreme Court of

the United States, to reverse the judgment rendered by the circuit court of the United States for the second circuit & northern district of New York, in a certain action in which the said James C. Woodruff &
72 Daniel Macauley were plaintiffs & the said town of Genoa was defendant, & in which said action a judgment has been rendered in said circuit court in favor of said plaintiffs and against the said town of Genoa, for the sum of eighteen thousand five hundred & thirty-one dollars & thirty-four cents, damages & costs, and the record thereof filed with the clerk of said circuit court, at his office in the city of Utica, on the fifteenth day of September, eighteen hundred & seventy-three.

Now, therefore, the condition of this obligation is such that if the said town of Genoa shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation to be void; otherwise the same shall be & remain in full force & virtue.

ARVID MOSHER.	(L. S.)	LUCIEN B. KING.	(L. S.)
ALFRED LANTERMAN.	(L. S.)	A. YILLOTSON.	(L. S.)
JOHN JACKSON.	(L. S.)	CHARLES E. KENDALL.	(L. S.)
JOHN STEPHENSON.	(L. S.)	JOHN L. KING.	(L. S.)
STEPHEN FESSENDEN.	(L. S.)	HENRY MCGUIGAN.	(L. S.)
SIDNEY COON.	(L. S.)	A. E. SLOCUM.	(L. S.)
WILLIAM MALLISON.	(L. S.)	HENRY CHASE.	(L. S.)
CALVIN JUMP.	(L. S.)	EDMUND BROWNELL.	(L. S.)
MARQUIS D. KING.	(L. S.)	EZRA C. SLOCUM.	(L. S.)
LUCIUS A. GOODYEAR.	(L. S.)	ISAAC PECK.	(L. S.)
EDMUND P. SHAW.	(L. S.)	NETUS JUMP.	(L. S.)
BRAINERD LYON.	(L. S.)	EDWIN A. AVERY.	(L. S.)
GEORGE F. KING.	(L. S.)	NORMAN B. ATWATER.	(L. S.)
IRVIN MEAD.	(L. S.)	JASON G. ATWATER.	(L. S.)
THOMAS P. GOODYEAR.	(L. S.)	PHILO CLARK.	(L. S.)
SAMUEL C. FESSENDEN.	(L. S.)	DANIEL VALENTINE.	(L. S.)
WILSON MERRITT.	(L. S.)		

73 Circuit court of northern district of New York.

UNITED STATES OF AMERICA,
State of New York, Cayuga County, ss:

On this sixteenth day of September, 1873, before me, the subscriber, personally appears Arvid Mosher, Alfred Lanterman, John Jackson, John Stephenson, Stephen Fessenden, Sidney Coon, William Mallison, Calvin Jump, Marquis De King, Lucius A. Goodyear, Edmund P. Shaw, Brainerd Lyon, George F. King, Irvin Mead, Thomas P. Goodyear, Wilson Merritt, Lucien B. King, Adonijah Tillotson, Charles E. Kendall, John L. King, Henry McGuigan, Arthur E. Slocum, Henry Chase, Edmund Brownell, Ezra C. Slocum, Isaac Peck, Netus Jump, Edwin A. Avery, to me personally known to be the same persons described in and who executed the within and annexed instrument, and acknowledged that they executed the same.

Witness my hand and notarial seal the day last above written.

[NOTARIAL SEAL.] SAMUEL ADAMS,
Notary Public in & for Cayuga County, N. Y.

74 UNITED STATES OF AMERICA,
Northern District of New York,
State of New York, Cayuga County, ss:

Arvid Mosher, Alfred Lanterman, John Jackson, John Stephenson, Stephen Fessenden, William Mallison, Calvin Jump, Marquis De King, Ed-

mund P. Shaw, Irvin Mead, Thomas P. Goodyear, Wilson Merritt, Adonijah Tillotson, Charles E. Kendall, John L. King, Henry McGuigan, Arthur E. Slocum, Henry Chase, Edmund Brownell, Ezra C. Slocum, Netus Jump, Isaac Peck, the sureties in the within & annexed bond, being duly sworn, depose and say, and each for himself says, that he is a householder and freeholder, resident within said county and district, to wit, in the town of Genoa aforesaid, and that he is worth two thousand dollars over and above all debts and liabilities which he has incurred.

ARVID MOSHER.
ALFRED LANTERMAN.
JOHN JACKSON.
JOHN STEPHENSON.
STEPHEN FESSENDEN.
75 SIDNEY COON.
WILLIAM MALLISON.
CALVIN JUMP.
M. D. KING.
EDMUND P. SHAW.
IRVIN MEAD.
THOMAS P. GOODYEAR.
WILSON MERRITT.
A. TILLOTSON.
CHARLES E. KENDALL.
JOHN L. KING.
HENRY MCGUIGAN.
ARTHUR E. SLOCUM.
HENRY CHASE.
EDMUND BROWNELL.
EZRA C. SLOCUM.
NETUS JUMP.
ISAAC PECK.

Sworn and subscribe' to before me this sixteenth day of September, 1873.

[NOTARIAL SEAL.] SAMUEL ADAMS,
Notary Public.

(Indorsed:) Bond. Town of Genoa. Penalty, $37,250.00. Woodford & Macauley case.

I approve of the within bond as to its form & the sufficiency of the sureties to stay execution.

WARD HUNT.

Filed September 22, 1873.

76 UNITED STATES OF AMERICA, *ss*:

[SEAL.] The President of the United States, to the judges of the circuit court of the United States for the second circuit & northern district of New York, greeting:

Because in the records & proceedings, and also in the rendition of judgment of a plea, which is in the said circuit court and northern district of New York, before you, between James O. Woodruff & Daniel Macauley, plaintiffs, and the town of Genoa, in the county of Cayuga, & State of New York, a manifest error hath happened, to the great damage of the said town of Genoa, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full & speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record & proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, A. D. one thousand eight hundred & seventy-three, next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what

of right and according to the laws & customs of the United States should be done.

Witness the Hon. Nathan Clifford, senior associate judge and acting Chief-Justice of the said Supreme Court, the 22d day of September, in the year of our Lord one thousand eight hundred and seventy-three.

Allowed by—

WARD HUNT.

CHARLES MASON,
Clerk of Circuit Court of the United States for the Northern District of New York.

(Indorsed:) Supreme Court of the United States. The town of Genoa, plaintiff in error. James O. Woodruff and Daniel Macauley, defendants in error. Writ of error. Filed Sept. 22, 1873.

77 UNITED STATES OF AMERICA, *ss*:

To James O. Woodruff and Daniel Macauley, greeting:

You are hereby cited & admonished to be & appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the second circuit & northern district of New York, wherein the town of Genoa is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Nathan Clifford, senior associate judge and acting Chief-Justice, of the said Supreme Court of the United States, this 21st day of September, in the year of our Lord one thousand eight hundred and seventy-three.

WARD HUNT.

78 UNITED STATES OF AMERICA.
Northern District of New York, Cayuga County, ss:

Warren A. Worden, of Auburn, in said county & district, being duly sworn, says that on the 23rd of Sept., 1873, he personally served a copy of the within citation on David Wright, esq., the plaintiff's attorney, by handing the same to & leaving it with him personally at his office in Auburn aforesaid.

WARREN A. WORDEN.

Sworn & subscribed before me this 23d day of September, 1873.

CHARLES L. ADAMS,
U. S. Commissioner Northern District of N. Y.

(Indorsed:) Supreme Court of the United States. The town of Genoa plaintiff in error; James O. Woodruff & Daniel Macauley, defendants in error. Citation. To keep and file.

Due and personal service of a copy of the within citation is admitted this 23d day of September, 1873.

D. WRIGHT,
Plff. Atty.

Filed Sept. 24, 1873.

79 UNITED STATES OF AMERICA,
Northern District of New York, ss.

I, Charles Mason, clerk of the circuit court of the United States for the northern district of New York, do hereby certify that I have com-

pared the writings annexed to this certificate, and they are true copies of their respective originals and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of James O. Woodruff and Daniel Macauley *vs.* The Town of Genoa.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Utica, in said district, this 10th day of October, A. D. 1873.

[SEAL.] CHARLES MASON, *Clerk.*

(Indorsement on cover:) No. 265. The Town of Genoa, plaintiff in error, *vs.* James O. Woodruff and Daniel Macauley. N. New York, C. C. U. S. Filed 16th October, 1873.

SUPREME COURT
UNITED STATES.

THE TOWN OF GENOA,

Plaintiff in Error,

vs.

JAMES O. WOODRUFF and
DANIEL MACAULEY,

Defendants in Error.

Statement of the Case, with Assignment of Errors, and Brief for Plaintiff in Error.

WARREN A. WORDEN,

Attorney for Plaintiff in Error.

AUBURN, N. Y.

H. L. COMSTOCK,

Of Counsel,

CANANDAIGUA, N. Y.

CANANDAIGUA, N. Y.:
ONTARIO COUNTY TIMES STEAM PRINTING HOUSE.
1875.

SUPREME COURT.
UNITED STATES.

THE TOWN OF GENOA,
Plaintiff in Error,
vs.
JAMES O. WOODRUFF and DANIEL MACAULEY,
Defendants in Error.

WRIT OF ERROR TO THE SECOND CIRCUIT.

NORTHERN DISTRICT OF NEW YORK.

STATEMENT OF THE CASE.

This case arises upon the return to a writ of error issued out of this Court to the Circuit Court of the Northern District of New York. The cause was tried at the Circuit Court held at Canandaigua, in said District, on the 19th day of June, 1873, by and before the Hon. Ward Hunt, one of the Associate Justices of this Court.

The action was brought to recover the amount claimed to be due on eleven instruments in writing, called bonds, but not under seal, with coupons annexed, alleged to have been made and issued by the Town of Genoa, for the sum of one thousand dollars each, in pursuance of an act of the legislature of the State of New York,

entitled "AN ACT to authorize any town in the County of Cayuga to borrow money for aiding in the construction of a railroad, or railroads, from Lake Ontario to the New York and Erie, or Cayaga and Susquehanna Railroad: Passed April 16, 1852, three-fifths being present."

The first, second and tenth sections of this act are in the words and figures following, to wit:

"§ 1. It shall be lawful for the supervisor of any town in the County of Cayaga, and the assessors of such town, who are appointed by this act as commissioners to act in conjunction with the said supervisor in effecting and executing the purposes of this act, to *borrow*, on the faith and credit of said town, such a sum of money as they may deem necessary, not to exceed twenty-five thousand dollars, for a term of time not exceeding twenty years, with such rate of interest as may be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signatures, a bond or bonds on which the interest shall be made payable annually or semi-annually, during the term said money may be borrowed, and the principal and interest of which loan shall be made payable in such sums, and at such times and place as shall be agreed upon and expressed in the bonds duly executed under the authority of this act. All moneys borrowed under the authority of this act, shall be paid over to the president and directors of such railroad company, (now organized, or such company as may be organized, according to the provisions of the general railroad law, passed April 2, 1850,) *as may be expressed* by the written assent of two-thirds of the resident tax-payers of said town, to be expended by such president and directors in grading, constructing and maintaining a railroad or railroads, passing through the city of Auburn, and connecting Lake Ontario with the Susquehanna and Cayuga railroad, or the New York and Erie railroad, *provided always*, that the said supervisor and commissioners shall have *no power* to do any of the acts authorized by this act, until a railroad company has been duly organized according to the requirements of the general railroad law for the purpose of constructing the aforesaid described railroad, and the written assent of two-thirds of the resident persons taxed in said town, as appearing upon the assessment roll of such town *made next previous to the time such money may be borrowed*, shall have been obtained by such supervisor and commis-

sioners, or some one or more of them, and filed in the clerk's office of Cayuga county, together with the affidavit of such supervisor or commissioners, or any two of them, attached to such statement, to the effect that the persons whose written assents are thereunto attached and filed as aforesaid, comprises two-thirds of all the resident tax-payers of said town on its assessment roll *next previous thereto.*

"§ 2. It shall be lawful for the supervisor and commissioners of any town in said county, on obtaining and filing such assent, as provided in the first section, to subscribe for and take, in the name of, and for said town, such a number of shares of the capital stock of such company as shall or may be organized for the purpose of constructing the aforesaid described railroad, or railroads, as will be equal to the amount of the bonds executed under the authority of this act; and such town may, with the assent of the number of tax-payers aforesaid, instead of borrowing the money allowed to be raised upon the bonds of said town, or upon its faith and credit, as in the first section of this act mentioned, raise the amount of its subscription to the stock of said railroad company by tax upon the taxable property of said town, and which tax may be levied and collected in the manner mentioned in this act by the supervisors of said county, and in such sums as the said supervisors may determine and direct.

"§ 10. The assessors appointed to act as commissioners by section first of this act, shall hold their office till the next annual town meeting of their town, when it shall be the duty of the electors of said town to select, by ballot, in the same manner that town officers are now selected, two commissioners to be called 'railroad commissioners,' to act in conjunction with the supervisor in carrying into effect the provisions of this act, and the action of a majority of such supervisor and commissioners shall at all times be sufficient for carrying into effect the provisions of this act."

The plaintiffs, James O. Woodruff and Daniel Macauley, in the first count of their complaint, alleged, among other things, the organization, on the 23d day of August, 1852, of the Lake Ontario, Auburn and New York Railroad Company, according to the provisions of the general railroad law of the state of New York, passed April 2nd, 1850, for the purpose of constructing and

operating a railroad commencing at some point on the Susquehanna and Cayuga Railroad about seven miles from the village of Ithaca, in the county of Tompkins and state of New York, and extending thence to the city of Auburn and thence to the termination of said railroad at Little Sodus Bay, in the town of Sterling, Cayuga county.

It is also alleged that the assent of two-thirds of the resident persons taxed in said town of Genoa, as appeared on the assessment roll of said town next previous to the time of borrowing the money authorized by said act, had been obtained in pursuance of said act, and filed in the clerk's office of Cayuga county, together with the affidavit required by said act, attached to said written assents, to the effect that the persons whose written assents were thereto attached and filed as aforesaid, comprised two-thirds of all the resident tax-payers of said town on its assessment roll, *next previous to the obtaining said written assents*, before the execution and delivery of any bonds by said supervisor and commissioners of said town.

That afterwards, to wit: on the 26th day of February, 1853, John King, who was then supervisor of said town, and Allen Palmer and Amos Hurlbutt, who were then railroad commissioners of said town, duly elected by the electors of said town, duly executed a certain writing obligatory, or bond of said town, dated the 26th day of February, 1853, and numbered four in the series of bonds executed under said act, whereby said town, in pursuance of said act, acknowledged itself to owe, and promised to pay the bearer, the sum of $1,000, with interest at the rate of seven per cent. per annum, payable semi annually, on the first days of January and July in each year, on the surrender of the coupons to said bonds attached, at the Bank of the State of New York, in the city of New York, the principal sum to be reimbursed at the same place, at the expiration of twenty years

from the 1st day of January, 1853; that on the 2nd day of March, 1853, said supervisor and commissioners attached to said bond *thirty-nine* several coupons, or promises to pay, the semi-annual interest, of *thirty-five dollars each*, which would become due and payable upon the expiration of each and every six months, from and after the first day of January, 1854, until the first day of January, 1873.

That afterwards, and before said bonds was negotiated, and on the 22nd day of August, 1853, the clerk of said county of Cayuga endorsed upon said bond his official certificate that a paper purporting to be the written assent of two-thirds of the resident tax-payers of said town with the affidavit required by section one of the act refered to in said bond, had been filed in said clerk's office.

That said supervisor and commissioners, afterwards, and after the execution of said bond and coupons, and after the organization of said railroad company, and after said written assents and affidavit had been filed, to wit: on the first day of January, 1854, borrowed, on the faith and credit of said town, of Ashbel Avery, the sum of one thousand dollars, and to secure payment thereof, with interest thereon, delivered the said bond, with said coupons thereto attached and said certificate of said clerk thereon endorsed, to said Avery.

That on the first day of January, 1857, the plaintiffs, for a valuable consideration, purchased said bond and coupons thereunto attached, *all of which then remained unpaid;* that said bond and coupons were then delivered to them, and have ever since remained in their possession as the owners thereof.

The plaintiffs also aver that said town had not, at the time the moneys mentioned in said bond and coupons became due, nor has it at any time since had, at the said Bank of the State of New York, or elsewhere, any money or means whereby said several sums of money

could be, or would have been, paid, had a demand thereof been made when the same became due, and that said town has hitherto wholly refused, and still does refuse, to pay said several sums in said coupons and said bond specified, being the principal and interest which had accrued upon said bond from the first day of January, 1854, to the first day of January, 1873.

There are ten other counts in the complaint, each like the first, except that it sets out a bond of a different number.

The defendant, in its first answer, denied the whole of the plaintiffs' complaint, and each and every allegation therein contained, except the passage of the said act of April 16, 1852, and the organization of said railroad company.

In its second answer, it insists that it is not a citizen, but one of the political and civil divisions of the state of New York, and that this court, (i. e., the Circuit Court,) has no jurisdiction of the defendant.

The third answer sets up the statute of limitations as to the interest upon the said alleged bonds and coupons, which became due and accrued on or prior to the first day of January, 1867.

The fourth answer also sets up the statute of limitations as to the whole of the alleged causes of action.

The fifth answer is substantially a plea of *non est factum* as to the whole of said bonds and coupons.

By its sixth answer the defendant avers, that the supervisor and assessors of said town, in office when said act of the Legislature of the state of New York became a law, did not, nor did either of them, or any officer or officers of said town, or any other person or persons, ever obtain or file, in the clerk's office of Cayuga county, the written assents of two-thirds of the resident persons taxed in said town, as appeared on any assessment roll of said town, as required by said act, and that said town never was authorized, or empowered, in any way

or manner, or for any cause or purpose, nor was any person or persons, officer or officers of said town, ever authorized or empowered, in any way or manner, or for any cause or purpose, to borrow any money, or to execute or deliver for said town, the said several bonds and coupons, or any or either of them, in any way or for any cause or purpose, and that said several bonds and coupons are illegal and void, and of no force or effect whatever.

In the seventh answer, the defendant avers that the supervisor and assessors of said town, in office when said act of the legislature of the state of New York, first mentioned in said complaint became a law, did not, nor did any or either of them, or any officer or officers of said town, or any other person or persons, ever make or file, in the office of the clerk of Cayuga county, any affidavit to the effect that the persons, whose written assents are thereto attached and filed, comprise two-thirds of the resident tax-payers of said town on its assessment roll previous thereto, as required by said act, and that therefore said town never was authorized, nor was any person or persons, officer or officers, ever authorized or empowered to borrow any money on the faith and credit of said bonds and coupons, or to execute or deliver said bonds and coupons, or any or either of them, and that the same are therefore illegal and void.

In the eighth answer, the defendant alleges that said John King, Allen Palmer, and Amos Hurlbutt, in said complaint mentioned, never were, nor were any or either of them, the agents of said town for the purpose of executing or delivering said several supposed bonds and coupons, or any or either of them, in any way or for any cause or purpose; nor had they, or any or either of them, any authority or power to execute or deliver, for said town, the said several supposed bonds and coupons, or any or either of them.

In the ninth answer, the defendant avers that the first

installment of interest, secured to be paid in and by said supposed bonds, and each of them, is made payable within a term less than six months from the date thereof, to wit: in four months and twenty-six days from such date, and that the interest secured to be paid by each of said bonds exceeds the sum of seven per cent. per annum.

In the tenth and last answer, the defencant alleges that said supposed bonds and coupons were not, nor were any or either of them, ever executed or delivered for money borrowed or agreed to be borrowed, on the faith and credit of said town, but, on the contrary, that said supposed bonds and coupons, and each of them, were delivered to the Lake Ontario, Auburn and New York Railroad Company, for stock in said road, and which was the first and only delivery of said bonds and coupons, in any way or for any cause or purpose, and that such negotiations and delivery was without authority and unauthorized, and was, and is illegal and void, and in direct violation of the requirements and conditions of said act of the legislature, and that, from that time, the same remained in the sole possession of said railroad company or its assigns; and that, at the time when the plaintiffs became owners and holders of said bonds and coupons, there was due and unpaid on each of said alleged bonds, with the coupons attached thereto, a large sum of money, to wit: the sum of eight hundred dollars or thereabouts, for interest then due and unpaid, and that the said plaintiffs, at the time when they became such owners and holders of said bonds and coupons, well knew that such interest was due and unpaid on the same respectively, and that said plaintiffs became such owners, holders and bearers of said bonds and coupons respectively, not in the ordinary course of business and without such knowledge as aforesaid, and without paying a *bona fide* and valuable consideration for the same, and with full knowledge of the original de-

livery of them to said railroad company as aforesaid, and that the said plaintiffs are not *bona fide* owners, holders or bearers of them, or either of them for a valuable consideration.

On the trial, the plaintiff below introduced in evidence a certified copy of the articles of incorporation of the Lake Ontario, Auburn and New York Railroad Company, referred to in the pleadings, which describes the railroad as running from some point on Little Sodus Bay, in the county of Cayuga, passing through the city of Auburn, and several other towns in Cayuga county named, to a point on the Cayuga and Susquehanna Railroad, in the county of Tompkins, about seven miles from Ithaca, (fol. 41).

The plaintiffs then produced the several alleged bonds, coupons and clerk's certificate, mentioned and referred to in said complaint, or declaration, in this cause and proved that the signatures to the same were genuine, and that John King was supervisor, and Allen Palmer and Amos Hurlbutt, were railroad commissioners of said town, at the time when said alleged bonds were executed, (fol's 41, 42).

"The counsel for said plaintiffs then offered to read the said certificate of the clerk of Cayuga County in evidence, under the hand of said clerk, endorsed on each of said bonds, and to which the counsel for said defendant then and there objected, because there was no statute or rule of law of said state authorizing or empowering the clerk to make any such certificate. His honor the judge overruled said objection, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted. The said certificate was then read in evidence in the words and figures following, to wit :

'CAYUGA COUNTY CLERK'S OFFICE.

'I, Edwin B. Marvin, clerk of the county of Cayuga, hereby certify that a paper purporting to be the written assent of two-thirds of the resident tax-payers of the town of Genoa, with the affidavit required by sec.

1 of the act referred to by its title in the foregoing bond, has been filed in this office.

'Dated, Auburn, May 21, 1853.

[Signed] 'E. B. MARVINE, *Clerk.*'"

See Record, page 39 (fol's 42, 43).

The counsel for the plaintiffs then called as a witness one Lyman C. Comstock, who testified that he was clerk of Cayuga County; that he had with him, from the files of said office, the assents and affidavit annexed; that they were filed in said office on the thirtieth day of September, 1852, and of which assents the following is a copy:

"We, the undersigned, resident tax-payers of the town of Genoa, in the county of Cayuga, do hereby consent that the supervisor and assessors of said town may borrow, on the faith and credit of said town, such a sum of money as they may deem necessary, not exceeding twenty-five thousand dollars, for a term not exceeding twenty years, at such rate of interest as may be agreed upon, not exceeding seven per cent. per annum, and to execute therefor, under their official signature, a bond or bonds, in which the interest shall be made payable annually or semi-annually, during the term said money may be borrowed, and the principal and interest made payable in such sums and at such times and place as shall be agreed upon and expressed in the bonds to be executed; and that the moneys so borrowed may be paid to the president and directors of *a railroad company*, organized according to the requirements of the general railroad law, for the purpose of constructing a railroad connecting Lake Ontario with the Susquehanna and Cayuga Railroad, and passing through the city of Auburn, upon the stock of said railroad company to be subscribed for and taken by said supervisors and assessors in the name of the said town.

See Record, page 40 (fol's 43–45).

It appears by the record that there is endorsed on

said assents an affidavit, of which the following is a copy:

"STATE OF NEW YORK, }
CAYUGA COUNTY, } ss:

"John King, supervisor of the town of Genoa, in said county, Allen Palmer, Stephen Fessenden and Amos Hurlbutt, the assessors of said town, being duly sworn, say, and each for himself says, that the several persons whose written assents are hereto attached, comprise two-thirds of all the resident tax-payers of said town of Genoa, on its assessment roll made and completed next previous to the date hereof.

Dated, Genoa, September 11, 1852.

JOHN KING.
ALLEN PALMER.
STEPHEN FESSENDEN.
AMOS HURLBUTT.

Subscribed and sworn to before me, this 29th day of September, 1852.

HERMAN HOLDEN,
Justice of the Peace, Cayuga County."

See Record, page 40 (fol. 45).

"And the counsel for said plaintiffs then offered to read said assents and said affidavits in evidence, and to which the counsel for said defendant objected, on the ground that said plaintiffs must first prove that the signatures to said assents are the genuine signatures of those whose names purport to be signed to the same, and which objection was then and there overruled by said court, and to which ruling and decision the counsel for said defendants then and there, in due time and form, excepted, and the same was then and there duly noted by said court, and the said assents, the heading thereto, and the said affidavit, was then and there read in evidence by said counsel for said plaintiffs."

See Record, page 40 (fol. 46).

"The counsel for said defendant also, in due time, objected to the reading of the affidavit in evidence, on the ground that the same was not legitimate proof in the cause, and also because the word 'filed' was not in said affidavit, the said affidavit not averring that the assents thereto attached *and filed* as aforesaid, compose two-thirds of the resident tax-payers of said town, as ap-

peared on any assessment roll of said town, as required by said statute; but his honor, the judge, overruled said objection, and to which ruling and decision the counsel for said defendants then and there duly excepted, and the same was then and there duly noted by the court; and the said assents, and the heading thereto, and said affidavit, were then and there read in evidence by said counsel for said plaintiffs."

See Record, page 41 (fol's 46, 47).

"The counsel for said plaintiffs then offered to read in evidence the said several bonds, with the coupons thereto attached, as mentioned and referred to in said complaint, and to which the counsel for the defendant objected, and contended that the alleged bonds having been issued under a special statute, and that statute having pointed out and provided the mode and manner by which the money should be raised with which to pay them; that said statute formed a part and portion of the alleged bonds, as much so as if the same was incorporated in them, and that the payment of the same must be enforced in the mode and manner pointed out by the statute, and that this action could not be maintained. His honor, the judge, overruled said objection, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there duly noted by the court."

See Record, page 41 (fol's 47, 48).

"The counsel for the defendant then and there objected to the reading of said bonds and coupons in evidence, unless it was proved that the signatures to said alleged assents of the alleged tax-payers of said town, as filed in the clerk's office of Cayuga county, were genuine, and, in fact, signed by the persons whose names were attached to the same, and that they could not be proved by said affidavit; but his honor, the judge, overruled said objection, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted by the court."

See Record, page 41 (fol's 48, 49).

"The counsel for said defendant then and there objected to the reading of said bonds and coupons in evi-

dence, because the affidavit did not conform to the requirements of the statute as above mentioned. But his honor, the judge, overruled said objection, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted by the court."

See Record, page 41 (fol. 49).

"The counsel for said defendant then and there contended and insisted that, until the genuineness of the signatures to said alleged assents were proved in some way, other than by said affidavit, there was no evidence that the said John King, Allen Palmer and Amos Hurlbutt had any power or authority to execute or deliver said alleged bonds, or do anything under said act; but his honor, the judge, overruled said objection, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there duly noted by the court."

See Record, page 41 (fol's 49, 50).

"The counsel for said defendant then and there contended that the said John King, Allen Palmer and Amos Hurlbutt could not become agents of said town under said act, for the purpose of executing said alleged bonds prior to the obtaining and filing of the assents, as required by said act, and until after such assents had been obtained and filed as aforesaid, and that the said plaintiffs were bound, in some way, to prove, other than by the production of said affidavit by the clerk of Cayuga county, from the files of said office, that the signatures to said assents were genuine, and signed or authorized to be signed by the persons whose names appear to be thereto attached; but his honor, the judge, decided otherwise, and overruled said objection, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there duly noted by the court."

See Record, page 42 (fol. 50).

"The counsel for said defendant, also then and there contended and insisted that the recitals in said alleged

bonds, or in the *testatum* clause to said alleged bonds, were not evidence that the prior conditions required by said act to the issuing of said bonds had been complied with ; that the right, power and authority of the said John King, Allen Palmer and Amos Hurlbutt, to execute said alleged bonds, could not be proved by the recitals in said bonds, or in said *testatum* clause to said bonds ; that under the act in question they could not prove their own power and authority to execute or issue the same by recitals which they themselves should insert in said bonds, or in said *testatum* clause to the bonds which they themselves should execute ; and, if so, that the same were not sufficient for that purpose ; but his honor, the judge, decided otherwise, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there duly noted by said court."

See Record, page 42 (fol's 51, 52).

"The counsel for said defendant then and there objected to the reading of the said alleged bonds in evidence, because, by the terms of said bonds, the first installment or payment of interest was made payable in a less term than six months after the date of said bonds, to wit : on the first day of July thereafter, and that, therefore, they did not conform to the requirements and conditions of said act, and were, therefore, not such bonds as were authorized by the act in question ; but his honor, the judge, overruled said objection, and decided that said bonds were in conformity with the requirements and conditions of the statute in question, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there duly noted by said court."

See Record, page 42 (fol. 52).

"The counsel for said defendant then objected to the reading of the said several alleged bonds and coupons in evidence, because that, by making seven per cent. interest, payable every six months, the interest secured to be paid in and by the same, exceeded seven per cent. per annum ; but his honor, the judge, overruled said objection, and to which ruling and decision the counsel

for said defendant then and there excepted, and the same was then and there duly noted."

See Record, page 42 (fol. 53).

"The counsel for said defendant then and there objected to the reading of said alleged bonds and coupons in evidence, unless it was proved that they were executed and delivered for money borrowed ; but his honor, the judge, overruled said objection, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted."

See Record, page 42 (fol. 53).

"The said several objections to the reading of said bonds and coupons in evidence, having been overruled and excepted to as aforesaid, the counsel for said plaintiffs then produced the said several bonds, with the several semi-annual interest coupons thereto attached, from July first, eighteen hundred and fifty-six, to January first, eighteen hundred and seventy-three; and the said several bonds were then read in evidence, together with the interest coupons, which had become due and pyaable within six years next previous to the commencement of this suit."

See Record, page 42 (fol's 53, 54).

His honor, the judge, decided that, under the plea of the statute of limitations, the plaintiffs could recover only six years' interest upon said bonds (fol. 55).

"The counsel for said plaintiffs then contended that the said plaintiffs had a right to recover interest upon each coupon to which the statute of limitations did not apply, from the time when it became due up to the day of the trial of this suit, and to which the counsel for said defendant then and there objected, and contended that the said plaintiffs could only recover simple interest, and could not compound the same by casting interest upon interest ; but his honor, the judge, decided

otherwise, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted."

See Record, page 43 (fol. 56).

The said bonds were exact duplicates of each other, except as to their numbers; a copy of one of which is set out in the record, and is in the words and figures following, to wit:

"No. 4. (Oyer.)

"STATE OF NEW YORK—*County of Cayuga.*

"Seven per cent. loan, not exceeding $25,000.

"Be it known that the town of Genoa, in the County of Cayuga and state of New York, in pursuance of an act of the legislature of the said state, entitled 'An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a railroad or railroads from Lake Ontario to the New York and Erie, or Cayuga and Susquehanna Railroad,' passed April 10th, 1852, and for the purpose of aiding the construction of the Lake Ontario, Auburn and New York Railroad, owes and promises to pay to Ashbel Avery, or bearer, one thousand dollars, with interest at the rate of seven per cent., payable semi-annually, on the first days of January and July in each year, on surrender of the coupons hereto attached, at the Bank of the State of New York, in the city of New York, the principal to be re-imbursable at the same place at the expiration of twenty years from the first day of January, 1853.

In testimony whereof the supervisor and commissioners of the town of Genoa have, pursuant to the provisions of the act aforesaid, and the written assent of two thirds of the resident tax-payers of said town, obtained and filed in the office of the clerk of the county of Cayuga, hereunto subscribed their names this twenty-sixth day of February, A. D., 1853.

JOHN KING,
Supervisor.
ALLEN PALMER,
AMOS HURLBUTT,
Commissioners."

See Record, pages 43, 46 (fol's 56, 57, 67, 68).

There was endorsed on each of said bonds the certificate of the county clerk, as hereinbefore stated.

The following is a copy of one of the coupons, annexed to bond number four, the others being the same, except as to the time of payment, and the number of the bonds to which they were attached, viz :

"$35.

"The town of Genoa, in the county of Cayuga, hereby acknowledges that there will be due the bearer thirty-five dollars, payable at the Bank of the State of New York, in the city of New York, on the first day of January, eighteen hundred and seventy-three, being interest due that day on bond No. 4.

J. KING,
Supervisor.
A. PALMER,
A. HURLBUTT,
Commissioners."

See Record, pages 43, 47, (fol's 57, 69).

The plaintiffs then proved the interest and principal of said bonds, according to the ruling of the Court, to be seventeen thousand, one hundred and sixty-eight dollars and sixty cents, and rested, (fol. 58.)

"The counsel for said defendant then asked the court to rule and decide that on the above proof the plaintiffs were not entitled to recover; but his honor, the judge, declined so to rule or decide, but, on the contrary thereof, ruled and decided that, on the facts above proved the plaintiffs were entitled to recover; and to which ruling and decision the counsel for said defendant excepted, and the same was then and there noted."

See Record, page 43, 44, (fol. 58).

"The counsel for said defendant then offered to show that the bonds in suit were originally, and in the first instance, delivered to the railroad company mentioned

in the pleadings, for stock, and not for money borrowed; and to which the counsel for said plaintiffs then and there objected, and the court sustained said objection, and excluded the testimony; and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted."

See Record, page 44, (fol's 58, 59).

"The counsel for said defendant then offered to show that Benjamin Gould, Esq., of Cayuga county, was the owner and holder of the bonds now in suit, in eighteen hundred and fifty-four, and continued to be the owner and holder of them until sometime on or about the first day of September, eighteen hundred and sixty-seven, when he disposed of the same, but not to these plaintiffs; and to which the counsel for said plaintiffs then and there objected, and his honor, the judge, sustained the objection, and excluded the evidence thus offered; and to which ruling and decision the counsel for the defendant then and there excepted, and the same was then and there noted."

See Record, page 44, (fol. 59).

"The said defendant then offered to prove that the said Benjamin Gould commenced an action against the said town of Genoa, in the Supreme Court of the state of New York, some time on or about the ninth day of August, eighteen hundred and fifty-eight, on said bonds, to recover the interest then unpaid on the same; and that such proceedings were thereupon had in said action, that a judgment was rendered against said town for the said interest then due and unpaid on said bonds, and from which judgment the said town appealed to the court of appeals of said State, where said judgment was *recovered* [reversed], and at the same time that the case of Starin vs. The Town of Genoa was reversed, as reported in the 23d of New York Reports, 439, &c., and for the same reasons; and that said Gould then discontinued and withdrew said suit, and disposed of said bonds, but not to these parties; and to which the counsel for said plaintiffs then and there objected, and his honor, the judge, sustained the objection, and excluded the proof offered; and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted."

See Record, page 44, (fol's 59-61).

"The counsel for said defendant then and there contended and insisted that the proofs thus offered, if admitted in evidence, would change the burden of proof and compel the plaintiffs to prove that they were, in fact, *bona fide* holders for value of said bonds, and that under such proof and the circumstances of this case the mere production of said bonds by them did not prove that fact; but his honor, the judge, decided otherwise; and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there noted."

See Record, page 44, (fol. 61).

"The counsel for said defendant then offered to show that some of the signatures to said assents were not genuine, and that others were duplicates, and that, in point of fact, the same never were signed by two-thirds of the resident tax-payers of said town as required by said act, and to which the counsel for said plaintiffs objected, and his honor, the judge, after expressing great doubts on the subject, concluded to, and did, exclude the evidence thus offered; and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there duly noted by said court.

See Record, pages 44, 45, (fol's 61, 62).

"The counsel for said defendant then referred to the general statutes of the State of New York, under and by virtue of which it was claimed that the said town of Genoa was incorporated, and contended that the said town was not such a town as made a citizen of the State of New York, but was a part and portion of the machinery of the State government, and not a citizen of the State, and that this court had no jurisdiction over it or in this matter, but his honor, the judge, decided otherwise, and to which ruling and decision of his honor, the judge, the counsel for said defendant then and there excepted, and the same was then and there noted."

See Record, page 45, (fol's 62, 63).

Here the testimony closed.

"The counsel for said defendant then requested his honor, the judge, to charge the jury, that on the above proofs the plaintiffs were not entitled to recover. His honor, the judge, declined so to charge the jury; and to which refusal the counsel for said defendant then and there excepted and the same was then and there noted by the court."

See Record, page 45. (fol. 63).

"His honor, the judge, then charged the jury that the plaintiffs, on the above proofs, were entitled to recover the principal secured to be paid by said several bonds, together with the interest thereon from the first day of January, eighteen hundred and seventy-three to the time of trial, together with the amounts specified in the several coupons which became due and payable within six years previous to the commencement of this suit, together with the interest upon said several coupons from the times the monies thereon severally specified became due and payable to the time of the trial."

After a request and exception by the counsel for said plaintiffs, "The counsel for said defendant then and there, and in due time and manner, excepted to so much of such charge whereby the said judge charged said jury that the said plaintiffs were entitled to recover interest upon said several coupons from the time the monies therein severally specified became due and payable to the time of trial; and which said exception was then and there duly noted by said court."

See Record, page 45, (fol's 63, 64, 65).

"The jury then, under the direction of the court, as aforesaid, and without retiring from said court, found their verdict for the plaintiff for the said sum of seventeen thousand one hundred and sixty-eight dollars and sixty cents."

Judgment having been entered on said verdict, the defendant sued out a writ of error.

See Record, page 49, 50.

ASSIGNMENT OF ERRORS.

And now comes the said the town of Genoa, plaintiff in error, by Warren A. Worden, its attorney, before the Justices of the Supreme Court of the United States, at the capitol in the city of Washington, and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit:

First. That his honor, the judge, overruled the objection made by the counsel for the said defendant, the town of Genoa, to the reading in evidence of the said certificate of the clerk of Cayuga county, annexed to each of said alleged bonds, and admitted the same in evidence, the said certificate being unauthorized, insufficient, invalid, and void in law; therefore, in that there is manifest error.

Second. There is also manifest error in this, to wit: that his honor, the judge, overruled the objection made by the defendant's counsel to the reading in evidence of the said written assents of certain alleged resident taxpayers of the said town of Genoa, and the affidavit annexed thereto, and received the same in evidence without any proof that the signatures of the persons whose names purport to be signed to the same were the genuine signatures of such persons; therefore, in that there is manifest error.

Third. There is also manifest error in this, to wit: that his honor, the judge, overruled the objection made by the counsel for the said defendant, the town of Genoa, to the reading in evidence of said affidavit annexed to said written assents, on the ground that the same was not legitimate proof in the cause, and also because the word "filed" was not in said affidavit, the said affidavit not averring that the assents thereto attached and filed as aforesaid composed two-thirds of the resident taxpayers of said town as aforesaid on any assessment roll

of said town as required by said statute, and admitted said affidavit in evidence ; therefore, in that there is manifest error.

Fourth. There is also manifest error is this, to wit : that his honor, the judge, overruled the objection made by the counsel for the defendant, the town of Genoa, to the reading in evidence of the said several bonds, with the coupons thereto attached as mentioned and referred to in said complaint, on the ground that the alleged bonds having been issued under a special statute, and that statute having pointed out and provided the mode and manner by which the money should be raised with which to pay them, the payment of the same must be enforced in the mode and manner pointed out by the statute, and that this action could not be maintained ; therefore, in that there is manifest error.

Fifth. There is also manifest error in this, to wit : that his honor, the judge, overruled the objection made by the defendant's counsel to the reading of the said several alleged bonds and coupons in evidence, unless it was proved that the signatures to said alleged assents of the tax-payers of said town, as filed in the clerk's office of Cayuga county, were genuine, and, in fact, signed by the persons whose names were attached to the same, and that they could not be proved by the said affidavit, and admitted the said several alleged bonds and coupons in evidence without such proof ; therefore, in that there is manifest error.

Sixth. There is also manifest error in this, to wit : That his honor, the judge, overruled the objection made by the defendant's counsel to the reading of the said several alleged bonds and coupons in evidence, because the said affidavit did not conform to the requirements of the statute above mentioned ; therefore, in that there is manifest error.

Seventh. There is also manifest error in this, to wit : that his honor, the judge, refused to decide, as contend-

ed and insisted by the said defendant's counsel, that until the genuineness of the signatures to said alleged assents were proved in some way, other than by said affidavit, there was no evidence that the said John King, Allen Palmer and Amos Hurlbutt had any power or authority to execute or deliver said alleged bonds, or to do anything under said act, and overruled said objection ; therefore, in that there is manifest error.

Eighth. There is also manifest error in this, to wit : that his honor, the judge, refused to decide, as contended by the counsel for said defendant, the town of Genoa, that the said John King, Allen Palmer and Amos Hurlbutt, could not become agents of said town under said act for the purpose of executing said alleged bonds, prior to the obtaining and filing of the assents, as required by said act, and until after such assents had been obtained and filed as aforesaid, and that said plaintiffs were bound in some way to prove, other than by the production of said affidavit by the clerk of Cayuga county from the files of said office, that the signatures to said assents were genuine, and signed, or authorized to be signed by the persons whose names appear to be thereto attached, and decided otherwise, and overruled said objection ; therefore, in that there is manifest error.

Ninth. There is also manifest error in this, to wit : that his honor, the judge, refused to decide, as contended and insisted by the defendant's counsel, that the recitals in said alleged bonds, or in the *testatum* clause to said alleged bonds, were not evidence that the prior conditions required by said act to the issuing of said bonds had been complied with ; that the right, power and authority of said John King, Allen Palmer and Amos Hurlbutt, to execute said alleged bonds, could not be proved by the recitals in said bonds, or in said *testatum* clause to said bonds ; that under the act in question, they could not prove their own power and

authority to execute or issue the same by recitals which they themselves should insert in said bonds or in said *testatum* clause to said bonds which they themselves should execute ; and, if so, that the same were not sufficient for that purpose, and decided otherwise ; therefore, in that there is manifest error.

Tenth. There is also manifest error in this, to wit : that his honor, the judge, overruled the objection made by the defendant's counsel to the reading of the said several alleged bonds in evidence, because by the terms of said bonds, the first installment or payment of interest, was made payable in a less term than six months after the date of said bonds, to wit : on the first day of July thereafter, and that, therefore, they did not conform to the requirements and conditions of said act, and were therefore not such bonds as were authorized by the act in question, and decided that said bonds were in conformity with the requirements and conditions of the statute in question ; therefore, in that there is manifest error.

Eleventh. There is also manifest error in this, to wit : that his honor, the judge, overruled the objection made by the defendant's counsel to the reading of the said several alleged bonds and coupons in evidence, because that by making seven per cent. interest payable every six months, the interest secured to be paid in and by the same exceeded seven per cent. per annum ; therefore, in that there is manifest error.

Twelfth. There is also manifest error in this, to wit : that his honor, the judge, overruled the objection made by the defendant's counsel to the reading of said alleged bonds and coupons in evidence, unless it was proved that they were executed and delivered for money borrowed, and admitted the same in evidence without such proof ; therefore, in that there is manifest error.

Thirteenth. There is also manifest error in this, to wit : that his honor, the judge, refused to decide as

contended by the defendant's counsel, that the plaintiffs could only recover simple interest, and could not compound the same by casting interest upon interest, and decided that the plaintiffs could recover interest upon said coupons from the time when they became due ; therefore, in that there is manifest error.

Fourteenth. There is also manifest error in this, to wit : that his honor, the judge, declined to rule and decide, as requested by the defendant's counsel, that on the above proof the plaintiffs were not entitled to recover, and, on the contrary thereof, ruled and decided that, on the facts above proved, the plaintiffs were entitled to recover ; therefore, in that there is manifest error.

Fifteenth. There is also manifest error in this, to wit : That his honor, the judge, excluded the evidence offered by the defendant's counsel to show that the bonds in suit were originally and in the first instance delivered to the railroad company mentioned in the pleadings for stock, and not for money borrowed, and sustained the objection made by the plaintiffs' counsel to such evidence; therefore, in that there is manifest error.

Sixteenth. There is also manifest error in this, to wit : That his honor, the judge, sustained the objection made by the plaintiffs' counsel to the evidence offered by the defendant's counsel, to show that Benjamin Gould, Esq., of Cayuga county, was the owner and holder of the bonds now in suit, in eighteen hundred and fifty-four, and continued to be the owner and holder of them until some time on or about the first day of September, eighteen hundred and sixty-seven, when he disposed of the same, but not to these plaintiffs, and excluded the evidence so offered ; therefore, in that there is manifest error.

Seventeenth. There is also manifest error in this, to wit : That his honor, the judge, sustained the objection made by the plaintiffs' counsel to the evidence offered

by the defendant's counsel, to prove that the said Benjamin Gould commenced an action against the said town of Genoa, in the Supreme Court of the State of New York, some time on or about the ninth day of August, eighteen hundred and fifty-eight, on said bonds, to recover the interest then unpaid on the same; and that such proceedings were thereupon had in said action that a judgment was rendered against said town for the said interest then due and unpaid on said bonds, and from which judgment the said town appealed to the Court of Appeals of said State, where said judgment was reversed, and at the same time that the case of *Starin v. The Town of Genoa*, was reported in the 23d of New York Reports, 439, &c., and for the same reasons; and that said Gould then discontinued and withdrew said suit, and disposed of said bonds, but not to these parties, and excluded the evidence so offered; therefore, in that there is manifest error.

Eighteenth. There is also manifest error in this, to wit: That his honor, the judge, refused to hold and decide, as contended and insisted by the defendant's counsel, that the proofs thus offered, as last above stated, if admitted in evidence, would change the burden of proof and compel the plaintiffs to prove that they were in fact *bona fide* holders for value of said bonds, and that under such proof and the circumstances of this case, the mere production of said bonds by them did not prove that fact, and decided otherwise; therefore, in that there is manifest error.

Nineteenth. There is also manifest error in this, to wit: That his honor, the judge, sustained the objection made by the plaintiffs' counsel to the evidence offered by the defendant's counsel to show that some of the signatures to said assents were not genuine, and that others were duplicates, and that, in point of fact, the same never were signed by two-thirds of the resident tax-payers of said town as required by said act, and excluded the

evidence so offered ; therefore, in that there is manifest error.

Twentieth. There is also manifest error in this, to wit: That his honor, the judge, refused to hold and decide, as contended by the defendant's counsel, that the said town was not such a corporation as made it a citizen of the State of New York, but was a part and portion of the machinery of the State government, and not a citizen of the State, and that said Circuit Court had no jurisdiction over it, or in this matter, and decided otherwise ; therefore, in that there is manifest error.

Twenty-first. There is also manifest error in this, to wit : That his honor, the judge, declined to charge the jury, as requested by the defendant's counsel, that on the above proofs the plaintiffs were not entitled to recover; therefore, in that there is manifest error.

Twenty-Second. There is also manifest error in this, to wit : That his honor, the judge, then charged the jury that the plaintiffs, on the above proofs, were entitled to recover the principal secured to be paid by said several bonds, together with the interest thereon from the first day of January, eighteen hundred and seventy-three to the time of trial, together with the amounts specified in the several coupons which became due and payable within six years previous to the commencement of this suit, together with interest upon said several coupons from the times the moneys thereon severally specified became due and payable to the time of trial ; therefore, in that there is manifest error.

Twenty-Third. There is also manifest error in this, to wit : That his honor, the judge, charged the jury that the plaintiffs were entitled to recover interest upon said several coupons from the times moneys thereon severally specified became due and payable to the time of trial; therefore, in that there is manifest error.

Twenty-Fourth. There is also manifest error in this, to wit : That by the record aforesaid, it appears, that

the judgment aforesaid, in form aforesaid given, was for the said James O. Woodruff and Daniel Macauley against the said The Town of Genoa, whereas, by the law of the land, the said judgment ought to have been given for the said The Town of Genoa against the said James O. Woodruff and Daniel Macauley ; therefore, in that there is manifest error.

Twenty-Fifth. There is also manifest error in this, to wit : That the said paper, purporting to be the written assent of certain tax-payers of the town of Genoa, that the supervisor and assessors of said town might borrow, on the faith and credit of said town, such a sum of money as they might deem necessary, not exceeding twenty-five thousand dollars, for a term not exceeding twenty years, at such rate of interest as might be agreed upon, not exceeding seven per cent. per annum, and might execute therefor, under their official signature, a bond or bonds, &c., was not drawn in conformity with the said statute, because it did not name nor in any manner designate the railroad company to whose president and directors the said moneys should be paid, and therefore said assents were void, and the said bonds and coupons were issued without authority and are void ; therefore, in that there is manifest error.

Twenty-Sixth. There is also manifest error in this, to wit : That by the record aforesaid, it appears that no money was borrowed, nor bonds issued, until more than a year had elapsed after the filing of said assents ; and therefore said assents had become inoperative, they having been made with reference to the said assessment roll of said town for the year 1852 ; therefore, in that there is manifest error.

And the said The Town of Genoa prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled and altogether held for nothing, and that it

may be restored to all things which it hath lost by occasion of the said judgment, &c.

WARREN A. WORDEN,
Attorney for Plaintiff in Error.
H. L. COMSTOCK,
Of Counsel for Plaintiff in Error.

POINTS.

I.

The certificate of the county clerk of Cayuga county, endorsed upon each of the bonds in question, was not competent evidence in the action for any purpose, for the following reasons :

1. It is not competent evidence by any rule or principle of the common law.

2. The statute, under which the bonds in suit purport to have been issued, does not provide for, nor authorize, the making of any such certificate, or any certificate whatever, by the county clerk ; and there is no other statute authorizing the county clerk to make any such certificate.

3. The provision in the Revised Statutes of New York that, "copies of all papers duly filed in the office of the county clerk, and transcripts from the books of record kept therein, certified by such clerk, with the seal of his office affixed, shall be evidence in all courts in like manner as if the originals were produced," (1 R. S., 377, sec. 65,) has no application.

(*a.*) The certificate is not under seal.

(*b.*) It is not appended to a copy of the assents or paper to which it refers.

4. This certificate is in no sense an official document ; and therefore it has no force or validity.

5. It is not calculated to give any additional currency to the bonds in question, and purchasers thereof had no right to rely upon it.

6. It follows that the court erred in admitting this certificate in evidence.

See Record, page 39.

II.

The Circuit Court erred in receiving in evidence the said assents and the said affidavit annexed thereto without any proof of the genuineness of the signatures of those whose names purport to be signed to the same, and in overruling the objection made by the counsel for the defendant below to the admission of the same in evidence, and the exception to such ruling is well taken.

See Record, page 40.

1. The question now presented involves the construction of sections one and two of chapter 375 of the laws of New York, for the year 1852, under which these bonds purport to have been issued.

2. The statute does not, in terms, declare that the affidavit annexed to the assents shall be evidence of the genuineness of the signatures subscribed thereto; and the question was, therefore, whether, by the true construction of the act, the Legislature intended to make it such evidence.

3. This question had been settled, so far as the highest court in the state could settle it, adversely to the defendants in error; for it had been repeatedly and uniformly held, under this act and other like acts, that in an action on the bonds, the plaintiff is bound to prove, affirmatively, that the written assent of the requisite number of resident tax-payers, was in point of fact, ob-

tained and filed in the county clerk's office, as required by the statute; and that the affidavit annexed to such assents does not prove the genuineness of the signatures thereto.

Starin v. The Town of Genoa, 23 N. Y., 439;
The People v. Mead, 36 N. Y., 224;
The People v. Mead, 24 id., 114;
Gould v. The Town of Sterling, 23 id., 445.

The case of *Starin v. The Town of Genoa*, (*Supra*), was decided by the Court of Appeals in 1861. The action was brought to recover instalments of interest claimed to be due on two bonds, of the same series as those in question here, issued under the same statute. The plaintiff recovered a verdict at the circuit, and judgment was rendered for the amount of the recovery by the Supreme Court, at general term, upon exceptions taken by the defendant, and ordered to be heard, in the first instance, at the general term. It was shown by the plaintiff on the trial, that some of the signatures to the assents in question were the genuine signatures of some of the resident tax-payers of the town, but he failed to prove that the persons whose signatures were subscribed to said assents constituted two-thirds of the resident tax-payers of said town, or that such signatures were the genuine signatures of two-thirds of such resident tax-payers, as appeared on any assessment roll of said town whatever. The Court of Appeals reversed the judgment of the Supreme Court, holding that the plaintiff was bound to prove, affirmatively, that the written assent of two-thirds of the resident tax-payers, was, in point of fact, obtained and filed in the county clerk's office, as required by the statute.

It was also held that the affidavit annexed to the assents did not prove the genuineness of the signatures to such assents.

The People, ex rel. Fielder, v. Mead (24 N. Y., 114), is

to the same effect. The decision in *Starin v. The Town of Genoa*, that the affidavit required by this statute, but not made evidence, to the effect that the persons whose written assents are thereto attached and filed as aforesaid, comprise two-thirds of all the resident tax-payers of said town on its assessment roll next previous thereto, is not proof, even in favor of a *bona fide* holder, of the fact of such assent, was reaffirmed.

The question came up again in the same case, after a second trial (36 N. Y., 224), and it was again held that the affidavit filed with the county clerk, pursuant to the second section of this act, is not evidence of the assent of the tax-payers of the town required by such act in favor of *bona fide* holders of town bonds issued under its provisions. GROVER, J., after referring to the two cases last above cited, said: "The bonds must be held to have been issued *without any power*, and therefore as possessing no validity. These conclusions are the necessary result of the cases cited *supra*. The relator has no legal demand against the town, nor any title to the money in the county treasury, which, by this proceeding, he is endeavoring to reach. I do not, therefore, see upon what ground he is able, by mandamus, to compel the officers of the town to do acts to enable him to obtain money belonging to the town to which he has no claim. If he can compel in that way those officers to go to the county treasurer and get the money and pay it over to him, I do not see why he might not in the same way compel the Board of Supervisors to levy the tax upon the town necessary to pay not only his interest but the principal. These defendants owe no duty to the plaintiff, because he has no title to the money."

Again, the learned justice said: "Bonds and coupons are the foundation of the plaintiff's claim, and these being invalid, his right fails; and, he having no right to any money, has no right to a mandamus to compel anybody to do any act to enable him to obtain it. It

is said that if the town does not dispute the plaintiff's title, no one else can. *The town has no power to recognize these bonds, or in any manner to raise money to pay them.* The bonds being invalid, the plaintiff is in the same position he would be if he had no bonds at all, and the money was raised as a donation for him. In such a case, I apprehend, no one would insist that a mandamus would lie to compel officers to do acts to enable the plaintiff to get the money."

The case of *Gould v. the Town of Sterling*, (23 N. Y., 445, 456,) arose upon another but similar statute, not, however, providing for the filing of any affidavit with the assents. No evidence was given or offered of the genuineness of the signatures, nor that the subscribers were resident tax-payers of the town. Each bond, however, had a certificate of the County Clerk attached to it, like the one in this case. SELDEN, J., said: "It is quite impossible to construe the proviso in the statute as embracing a *mere direction to the officers* upon whom the authority is conferred. It was plainly intended to make the obtaining of the assent of the tax-payers a *condition precedent* to the exercise of the power. Its words are, 'provided always that the said supervisor and commissioners *shall have no power* to do any of the acts authorized by this act until,' &c. This admits of but one interpretation. It would be impossible to create a condition by language more explicit. The want of proof, therefore, that this condition had been complied with, must be fatal to the recovery, unless the plaintiff is protected as a *bona fide* purchaser, or can maintain his position that the town is estopped."

The learned judge then proceeded to show that the plaintiff was not protected as a *bona fide* purchaser, and that the town was not estopped.

In *Starin v. the town of Genoa* (*supra*), the question was whether the affidavit of the supervisor and assessors endorsed on the assents, was evidence of the genu-

ineness of the signatures to such assents. As the statute does not, in terms, declare that the affidavit shall be evidence of the genuineness of such signatures, the Court must necessarily determine whether the Legislature intended to make it such evidence. The Court of Appeals has repeatedly determined that the Legislature did not so intend.

Another question, of great importance, was necessarily involved in this determination, viz.: whether the procuring and filing of the written assents of two-thirds of the resident tax-payers of the town was a *condition precedent* to the power of the supervisor and commissioners. This was also a question of construction of the statute which the state courts must determine; for, if the power did not exist until the assents were procured and filed, as required by the act, then, certainly, no recovery could be had upon the bonds until the fact that such assents had been procured and filed, should be proved in some way.

The Court of Appeals did determine, in 1861, that no recovery could be had upon these bonds without such proof, because *the power to issue them did not exist* until such assents were in fact procured and filed as required by the statute. That court has steadily adhered to that determination ever since.

The main question was whether the statute itself created the power, or whether the organization of the railroad company, whose railroad should answer the requirements of the act, and the procuring and filing of the written assents of two-thirds of the tax-payers of the town, as required by the act, were not *just as essential to the power to issue the bonds as the statute itself.* The Legislature had declared its intention and meaning in the most explicit terms. The language of the act is, "*Provided always*, that the said supervisor and commissioners shall have *no power to do any of the acts authorized by this act*, until a railroad company has been duly

organized," &c., "and the written assent of two-thirds of the resident persons taxed in said town, * * * shall have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga county."

The Court of Appeals held that the Legislature meant just what it so explicitly declared.

4. It is a fundamental principle in our American system of government, where the judicial power is distributed between the federal and state courts, and each court is obliged to administer both federal and state laws, that the state courts should have paramount authority in determining the meaning of state statutes, and that the federal courts should have like paramount authority in determining the construction of acts of Congress, and that this court should have appellate jurisdiction in cases arising in state courts involving the construction of federal laws.

Murdock v. Memphis, 20 Wall., 590.

5. It has been repeatedly held by this court, that the construction given to a state statute, by the highest court of the state, is regarded as part of the statute, and is as binding upon the courts of the United States as the text.

Leffingwell v. Warren, 2 Black, 599 ;
Aicardi v. The State, 19 Wall., 635 ;
Supervisors v. United States, 18 Id., 71;
Green v. Neal, 6 Peters, 291 ;
United States v. Morrison, 4 Id., 124;
Shelby v. Guy, 11 Wheat., 361;
Christie v. Pridgeon, 4 Wall., 196;
League v. Edgery, 24 How., 264.

This doctrine is absolutely essential to the rights of the citizens of the states. It would produce the greatest confusion and uncertainty if the rights of parties,

arising under a state statute, were to be determined by one rule in the state courts, and by another, and entirely different rule, in the federal courts.

It is not necessary to dwell upon this principle, important as it is, because it is so well understood, and has been so often and so recently applied by this court. The only question is, whether it is applicable in this case, upon the point now under discussion. That it *is* applicable, seems to me to not admit of a doubt. Certainly, here is a state statute to be construed. The statute relates to the power or authority conferred upon certain towns to borrow money and issue bonds for the same. The towns are public corporations or civil institutions of the state government. The supervisor and commissioners are public officers or agents employed in administering a state law. The power or authority itself concerns this body in its public political capacity. The Legislature undertook to impose certain conditions precedent upon the exercise of this power. The Court of Appeals, fourteen years ago, determined the construction of these conditions, holding that the power *did not exist* until these conditions were performed.

The bondholders, after endeavoring for years to collect the interest on the bonds in the state courts, and after the state courts had repeatedly decided against their validity, have resorted to the federal courts in the hope of obtaining, in this court, a different construction of the statute. I shall endeavor to show, in another connection, that the Court of Appeals adopted the true construction of the act; but that is not my object just now. I wish to impress upon the Court the paramount authority of the highest court of the state to settle the construction of the statute, and to determine the extent of the power conferred by it, and the conditions upon which alone it could be exercised.

The state court has first occupied the ground. There has been no vacillation or variation in its rulings as to

the meaning of this statute. This court has not before been called upon to construe this statute. There had been no decision in the state courts prior to the issuing of these bonds, or prior to the decision of the case of *Starin v. The Town of Genoa*, inconsistent with the construction given to this statute by the Court of Appeals.

The third, fourth, fifth, sixth, seventh and eighth assignments of error are submitted, without argument on my part, upon the brief made by Mr. Worden, in the case of *The Town of Venice v. Evander Murdock*, on this calendar. The fifth and seventh assignments of error raise the same question as the second, which has already been discussed.

III.

The exception to the ruling of his honor, the judge, referred to in the ninth assignment of error, is well taken.

This ruling and the exception taken to it, are stated in the record in the words following :

"The counsel for said defendant also then and there contended and insisted that the recitals in said alleged bonds, or in the *testatum* clause to said alleged bonds, were not evidence that the prior conditions required by said act to the issuing of said bonds had been complied with; that the right, power and authority of said John King, Allen Palmer and Amos Hurlbutt to execute said alleged bonds, could not be proved by the recitals in said bonds or in said *testatum* clause to said bonds; that under the act in question they could not prove their own power and authority to execute or issue the same by recitals which they themselves should insert in said bonds or in said *testatum* clause to the bonds which they themselves should execute ; and, if so, that the same were not sufficient for that purpose ; but his honor, the judge, decided otherwise, and to which ruling and decision the counsel for said defendant then and there excepted, and the same was then and there duly noted by the court."

See Record, page 42 (fol's 51, 52).

The determination of the question raised by this assignment of error depends upon the construction which shall be given to the statute by virtue of which the bonds purport to have been issued. The main question is whether the statute *itself* constituted the supervisor and commissioners agents of the town, for the purpose of borrowing money and issuing the bonds, or whether, by the true construction of the statute, the power to borrow money and issue bonds did not depend upon the organization of a railroad company whose proposed railroad should answer the description given in the statute, and also upon the procuring and filing of the written assents of two-thirds of the resident tax-payers of the town, as required by the act.

Upon this point, I desire to submit the following propositions :

1. The organization of a railroad company, of the description given in the statute, was essential to the *existence of the power* to issue the bonds.

(*a.*) The statute declares, in express terms, "that the said supervisor and commissioners *shall have no power* to do any of the acts authorized by this act, until a railroad company has been duly organized, according to the requirements of the general railroad law for the purpose of constructing the aforesaid described railroad." (Sec. 1).

(*b.*) The same section of the statute provides that, "all moneys borrowed under the authority of this act, shall be paid over to the president and directors of *such railroad company* (now organized or such company as may be organized, according to the provisions of the general railroad law, passed April 2, 1850), *as may be expressed* by the written assent of two-thirds of the resident tax-payers of said town, to be expended," &c.

(*c.*) This last provision of the statute plainly requires that the tax-payers shall determine what railroad company, answering the general description given in the

statute, shall receive the money to be borrowed, and whose stock shall be taken in exchange therefor.

(*d.*) There might be more than one railroad company organized under the general railroad law, answering the description in the statute.

(*e.*) No power is given to the supervisor and commissioners to determine what particular railroad company shall receive the proposed aid, and whose stock shall be taken.

The statute plainly requires that the *tax-payers* shall determine what company shall receive such aid, and whose stock shall be taken in exchange for the money, and that they shall *express* this determination *in their written assents*, given and filed according to the statute. Such is the only reasonable construction of the language of the act. The supervisor and commissioners, in paying over the money and subscribing for stock, must act under the direction of two-thirds of the tax-payers of the town, given in and by their written assent made and filed according to the statute, as to the particular railroad company with which they shall deal.

This statute is, in this respect, substantially like the general bonding act of the state (Laws of New York of 1869, chap. 907; Laws of 1871, chap. 925). That statute provides that the petitioning tax-payers shall express their "desire that such municipal corporation shall create and issue its bonds to an amount named in such petition, and invest the same, or the proceeds thereof, in the stock or bonds (as said petition may direct) of such railroad company in this state as may be named in said petition."

Under this statute, it has been held that, in order to confer jurisdiction upon the County Judge to entertain such petition and to render the adjudication provided for in the act, the petitioners must name, in the petition, the railroad company to be aided (*The People, ex rel.*

Rogers. v. Spencer, 55 N. Y., 1; *The People, ex rel. Sayre, v. Franklin*, 5 Lans., 129).

The People, ex rel. Akin, v. Morgan (55 N. Y., 587), arose under another statute which empowered the board of directors of the New York and Oswego Midland Railroad Co., to construct a branch railroad, connecting with its main track, (which did not run through Cayuga county,) running through certain specified counties to the city of Auburn, in Cayuga county, *whenever, in their judgment, it should be for the interest of the corporation*, and authorized the towns of the counties through which said branch should run, to issue bonds. &c. It was held that, to sustain the jurisdiction of a town, in a county specified, to issue its bonds, it must be made to appear that, before the issuing thereof, the board of directors exercised the discretionary power vested in them, and established a branch road through said county. RAPALLO, J., said: "It is obvious that the *mere passage of these acts* conferred no authority upon the town of Scipio to issue bonds."

It is just as obvious in this case as it was in that, that the *mere passage of the act in question*, conferred no authority on the town of Genoa to issue any bonds; but that, before any bonds could be issued, a railroad company must be organized, capable of receiving the proposed aid, and issuing its stock for the money.

2. The procuring and filing the written assent of two-thirds of the resident tax-payers of the town, as provided by the act, are just as esential to the power of the supervisor and commissioners to borrow money and issue bonds, as the organization of the railroad company.

(*a.*) It could not be known what railroad company should receive the proposed aid, until such written assent should be procured and filed, in which such railroad company should be designated.

(*b.*) The tax-payers must also determine whether the town should borrow the money to be paid to the

railroad company, or raise the amount of its subscription to the stock of the company by tax upon the taxable property of said town.

The statute provides that "such town may, with the assent of the number of tax-payers aforesaid, instead of borrowing the money allowed to be raised upon the bonds of said town, or upon its faith and credit, as in the first section of this act mentioned, raise the amount of its subscription to the stock of said railroad company, by tax upon the taxable property of said town, and which tax may be levied and collected, in the manner mentioned in this act, by the supervisors of said county, in such sums as the said supervisors may determine and direct."

Here is a discretionary power, conferred upon two-thirds of the tax-payers of the town, to determine whether any money shall be borrowed, or bonds issued, even in cases where stock is subscribed for. This discretionary power must be exercised by the tax-payers, in the manner provided for by the act, before the supervisor and commissioners can have any power to borrow money or issue bonds. No person or persons, except the tax-payers, can exercise this discretionary power.

By the general bonding act, above referred to, the petitioners are empowered to determine whether the municipal bonds shall be invested in the *stock* or *bonds* of the railroad company; and it has been held that they must do so, because no one else has the power. (*The People v. Van Valkenburgh*, 63 Barb., 105; *The People v. Hughitt*, 5 Lans., 89).

3. The tax-payers of the town of Genoa never determined what railroad company should receive the money, and whose stock should be taken in exchange therefor.

(*a.*) The language of the written assent is, "That the moneys so borrowed may be paid to the president and directors of *a railroad company*, organized accord-

ing to the requirements of the general railroad law, for the purpose of constructing a railroad connecting Lake Ontario with the Susquehanna and Cayuga railroad, and passing through the city of Auburn, upon the stock of the said railroad company to be subscribed for and taken by said supervisor and assessors in the name of said town."

(*b.*) It will be seen that the tax-payers have not named, nor in any manner designated, "The Lake Ontario, Auburn and New York Railroad Company," nor any other particular company.

The language of the assents is as general as that of the statute. Any railroad company, then organized, *or thereafter to be organized*, according to the requirements of the general railroad law, for the purpose of constructing a railroad connecting Lake Ontario with the Susquehanna and Cayuga railroad, and passing through the city of Auburn, would answer the description given by the tax-payers in their written assents in this case. This is no compliance with the statute.

This point does not seem to have been presented to the Court of Appeals in any of the cases to which I have referred. Analogous questions, arising under the general bonding act of the state, have been decided by that court. In *The People, ex. rel. Rogers, v. Spencer*, (55 N. Y., 1,) it was held that it must appear, in the petition of the tax-payers, that the railroad company named in the petition is a railroad company in the State of New York. In *The People, ex. rel. Green, v. Smith*, (55 N. Y., 135,) it was held that, under the provisions of the general act, as amended in 1871, the petition, in order to give the county judge jurisdiction, must show that the petitioners are not only a majority of the tax-payers of the municipal corporation to which it relates, but that they are a majority, "not including those taxed for dogs or highway tax only," the statute having dis-

qualified this class of tax-payers from being petitioners.

The petition, under the general bonding act, is the assent of the tax-payers, and answers the same purpose as the written assent under the act in question. The petition has always been treated as the initial, *jurisdictional* step in a proceeding to bond a municipal corporation.

If the supervisor and assessors, or commissioners, were agents of the town of Genoa for the purpose of borrowing money and issuing bonds, it must be because the statute in question made them such the moment it took effect; for nothing has been done since, in accordance with the act, to give them any additional power.

4. The proviso, in section one of the act in question, is an *absolute prohibition* against the borrowing of any money, or issuing any bonds, or subscribing for any stock of any railroad company, until the written assent of the requisite number of tax-payers has been procured and filed in accordance with the act.

Voorhees v. The Bank of the U. S., 10 Peters, 471;
Minis v. United States, 15 Id., 423;
Huydkaper v. Burrus, 1 Wash. C. C., 119;
Wyman v. Southard, 10 Wheat., 1, 30;
Gould v. The Town of Sterling, 23 N. Y., 456, 462;
Townsend v. Brown, 4 Zebrisk., 80;
Cumberland v. Magruder, 34 Md., 381;
Rex v. Justices of Middlesex, 2 B. & Adol., 818;
Dwar. on Stat., by Potter, 118;
Sedgwick on Statutes, 62.

In *Voorhees v. The Bank of the U. S.*, (*supra*), BALDWIN, J., speaking of such a proviso, said: "It is contended, by the counsel for the plaintiffs in error, that all the requisitions of the law are conditions precedent; which must not only be performed before the power of the court to order a sale, or the auditors to execute it,

can arise, but such performance must appear on the record.

"The first part of this proposition is the true meaning of the law of Ohio; the various acts requiring to be done previous to a sale are prescribed by a *proviso*, which, in deeds and laws, is a limitation or exception to a grant made or authority conferred; the effect of which is to declare that the one shall not operate, nor the other be exercised, unless in the case provided."

In *Minis v. United States*, (15 Peters, 445,) STORY, J., said: "The office of a proviso generally is, either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended, by the Legislature, to be brought within its purview."

How can it be said that there is any existing agency, when there is no power in the agents to do any act as such, and when, in order to confer any power to act, two-thirds of the resident tax-payers of the town must sign a written assent that such power may be exercised, and determine therein what railroad company shall be dealt with, and cause the same to be filed in the office of the county clerk? The Legislature has not conferred the power, nor determined what railroad company shall be dealt with, in subscribing for its stock, but has conferred, upon two-thirds of the tax-payers of the town, authority to confer this power by their written assent to its exercise, which must be made a matter of public record. The statute, in respect to the power to borrow money and issue bonds, is *dormant* until a railroad company is organized, and the assent of the tax-payers is procured and filed, in accordance with the provisions of the statute. It might remain dormant forever. Such is the settled construction of this statute by the highest court of the state. (*Starin v. The Town of Genoa*, 23

N. Y., 439; *The People v. Mead*, 36 Id., 224; *Gould v. The Town of Sterling*, 23 Id., 445.)

5. The defendants in error were bound to take notice of the statute, under which the bonds purport to have been issued, and which is referred to, by its title, on their face.

Marsh v. Fulton County, 10 Wall., 676;
Gould v. The Town of Sterling, 23 N. Y., 456;
Swift v. The City of Williamsburgh, 24 Barb., 427.

If the defendants in error had looked at the statute, they would have seen that the supervisor and commissioners could have no power to issue the bonds without the written consent of two-thirds of the tax-payers of the town, designating the railroad company to be dealt with, and that this written consent must be filed in the clerk's office of Cayuga county.

6. The defendants in error were just as much bound to take notice of the alleged assent of the tax-payers as of the statute, for it is just as essential to the authority of the supervisor and commissioners as the statute itself—made so by the statute—and just as much a matter of public record.

Swift v. The City of Williamsburgh, 24 Barb., 427;
Gould v. The Town of Sterling, 23 N. Y., 456.

7. The defendants in error can claim no protection as *bona fide* holders of the bonds or coupons, because the supervisor and commissioners had no authority to issue them.

Floyd Acceptances, 7 Wall., 666;
Marsh v Fulton County, 10 Id., 676;
Aspinwall v. Commissioners of the County of Daviess, 22 How., 364.

All the cases agree that the authority to contract must exist before any protection, as an innocent purchaser, can be claimed by the holder.

8. The defendants in error, upon their own showing, are not *bona fide* holders of the bonds or coupons.

(*a.*) They allege, in their complaint, that, on the second day of March, 1853, the supervisor and commissioners attached to each of said bonds thirty-nine several coupons, or promises to pay the semi-annual interest, of thirty-five dollars each, which would become due and payable at the expiration of each and every six months after the first day of January, 1854, until the first day of January, 1873 ; that the money was borrowed, and the bonds issued, on the first day of January, 1854, with the coupons before mentioned attached thereto ; that on the first day of January, 1857, they purchased the said bonds and coupons *thereto attached, all of which then remained unpaid.*

(*b.*) It follows, from these allegations, that, at the time the defendants in error purchased said bonds and coupons, six of the coupons, attached to each bond, were over-due and remained unpaid, and that they knew the fact.

(*c.*) The bonds were dishonored by the non-payment of three years' interest, which had become due thereon, and the defendants in error could not become *bona fide* purchasers thereof.

Newell v. Gregg, 51 Barb., 263;
Vinton v. King, 4 Allen, 562;
The First National Bank v. Scott Co., 14 Minn., 77;
Arents v. Commonwealth, 18 Gratt., 750;
The Mayor v. Ray, 1 Wall., 468.

In *Newell v. Gregg* (*supra*), it was held that no one can become a *bona fide* holder of a promissory note, so as to shut out a valid defence by the maker, where such holder takes it after, by its terms, money is past due upon it; that where a note is for the payment of money at a specified time, with interest payable annually, the payment of interest *annually* is as much a part

of the agreement as the promise to pay the principal; that it is a portion of the debt, and if, when the note is sold to a third person, a year's interest is past due, the note is dishonored; and that where the instrument furnishes evidence that the written promise to pay is broken, a party taking the same takes it with a warning that the maker may have some defense.

In *Vinton v. King* (*supra*), it was held that a note payable by instalments is over-due when the first instalment is over-due and unpaid; that one who takes it afterwards takes it subject to all equities between the original parties.

The First National Bank v. Scott County (14 Minn., 77), is nearly enough in point. County bonds, with interest coupons attached, were lost; and bought by the plaintiff, in good faith, at their market value, with all the coupons attached thereto, the interest being over-due for several years. It was held that the fact, that it thus appeared, from the face of the bonds, that the interest for several years was over-due and unpaid, was a circumstance sufficient to put the plaintiff on his guard; that the bonds were thus dishonored on their face; that the interest, equally with the principal, was a part of the debt which they were intended to secure; and that it is not material whether the whole or only a part of the debt was over-due.

The case now under consideration presents much stronger reasons for holding that the bonds were dishonored, at the time when the defendants in error allege that they purchased them, than those given in *Newell v. Gregg*, and *Vinton v. King*, above referred to; for in this case, five coupons attached to each bond were over-due and unpaid, and another coupon became due on the day of such purchase. I think I need not labor to convince this court that, by these repeated defaults in making payment of the interest for the period of three years, the bonds became dishonored, and that,

as these over-due coupons still remained attached to the bonds, the defendants in error took them with notice that they had been dishonored, and that the town did not intend to pay them. The fact that they held these coupons until January, 1873, before bringing action to recover upon them, affords additional evidence that they understood that the town refused to pay them.

9. the assent of the tax-payers became *inoperative* because the money was not borrowed, nor the bonds issued, until another assessment roll of the town had been completed.

(*a.*) The assent required by the statute is of "two-thirds of the resident persons taxed in said town as appearing on the assessment roll of such town *made next previous to the time such money may be borrowed.*"

(*b.*) The assents were procured and filed on the 30th day of September, 1852; and the affidavit states that the several persons whose written assents are thereto attached, comprise two-thirds of all the resident tax-payers of said town of Genoa on its assessment roll made and completed *next previous to the date thereof.*

(*c.*) The assessment roll referred to in the affidavit must be the assessment roll of 1852, for the assessors are required to complete the assessment roll, and to deliver the same to the supervisor, on or before the first day of September in every year.

1 Revised Statutes, 394, sec. 27;
Mygatt v. Washburn, 15 N. Y., 319.

(*d.*) It appears by the complaint that the money was borrowed, and the bonds issued, on the first day of January, 1854, and the bonds bear interest from that date.

(*e.*) The money was not borrowed, nor the bonds issued, until more than a year had elapsed after the filing of the assents; and a new assessment roll must be presumed to have been made and completed on or before the first day of September, 1853.

(*f.*) It was the plain intention of the Legislature that the money should be borrowed, and the bonds issued, if at all, after the filing of the assents of the tax-payers, and *before the completion of a new assessment roll;* for the affidavit, required to be attached to the assents, must be "to the effect that the persons whose written assents are thereto attached and filed as aforesaid, comprise two-thirds of all the resident tax-payers of said town on its assessment roll *next previous thereto ;*" and yet the assent must be of two-thirds of the tax-payers "appearing on the assessment roll of such town *made next previous to the time such money may be borrowed.*"

(*g.*) The affidavit annexed to the assents cannot refer to the assessment roll of 1853 ; and, therefore, it furnishes no evidence whatever that the persons, whose names purport to be subscribed to the written assent on file, constitute two-thirds of the resident persons taxed in said town, as appearing on the assessment roll of such town made in 1853, or next previous to the time when the money was borrowed.

(*h.*) According to the allegations in the complaint no coupons were attached to the bonds for any interest accruing prior to January first, 1854 ; and the presumption arising from this fact is, that the money was not borrowed, nor the bonds delivered, until that time ; and the defendants in error were chargeable with notice that such was the fact ; and besides, they allege that such was the fact.

(*i.*) There is, therefore, no evidence whatever in the case,—not even the poor evidence of the affidavit of the supervisor and assessors,—that the persons whose names purport to be signed to the written assent on file, constituted two thirds of the resident tax-payers of the town whose names appeared on the assessment roll of said town made next previous to the time when the money was borrowed.

The defendants in error have taken great pains to

allege and to prove the facts which raise this point. They must be held to the truth of their allegation, that the money was borrowed, if at all, and the bonds issued, on the first day of January, 1854,—especially as the bonds bore interest from that date. There is no evidence in the case that any money was ever borrowed. It cannot be presumed, in the absence of evidence, that the money was borrowed at an earlier period than is alleged in the complaint. This being so, it is not possible that these bonds can be valid. They were executed in February, 1853, before the assessment roll for that year could be made. They refer to assents *then on file* in the clerk's office of Cayuga county. But the bonds could have no validity until they were delivered to the lender of the money. The supervisor and commissioners could not hold them until another assessment roll was made, and then borrow money and issue the bonds, because the assent of the tax-payers was given with reference to the assessment roll of 1852, and the affidavit of the supervisor and assessors, sworn to on the 29th day of September, 1852, expressly refers to the assessment roll made and completed next previous to the date thereof.

The supervisor and assessors have not sworn that the persons, whose names purport to be signed to the written assents on file, comprise two-thirds of all the resident tax-payers of said town on its assessment roll for the year 1853, and there is *no other evidence of the fact.*

The persons who signed that assent might be two-thirds of the tax-payers of the town in the year 1852, and not be two-thirds of the tax-payers of said town as shown by the assessment roll of 1853. If the supervisor and commissioners could delay the issuing of the bonds until one new assessment roll should be made, after the filing of the assents, I do not see why they might not borrow the money and issue the bonds five years after the assents were filed. In either case, there

would be no compliance with the statute, which requires the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment roll made next previous to the time the money may be borrowed.

The supervisor and commissioners might just as well have issued the bonds without the assent of any of the tax-payers of the town. When the statute requires that the affidavit annexed to the assents shall be "to the effect that the persons whose written assents are thereto attached and filed as aforesaid, comprise two-thirds of all the resident tax-payers of said town on its assessment roll *next previous thereto*," and at the same time requires "the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment roll of such town made *next previous to the time such money may be borrowed*." The inference is irresistible, that the Legislature intended that the whole transaction should take place while one and the same assessment roll remained the last completed assessment roll of the town.

10. The defendants in error, having introduced in evidence the written assents on file, and it appearing that they were filed more than a year prior to the time when it is alleged that the bonds were issued and the money borrowed, and that the tax-payers have not named, nor in any manner designated, any railroad company whose stock should be subscribed for, cannot rely upon any recitals in the bonds against the record evidence thus introduced by themselves for the purpose of establishing the authority of the supervisor and commissioners to issue the bonds.

The defendants in error have themselves disclosed the true state of the case by introducing the written assents on file. If the assents are void, or had become inoperative before the bonds were issued, no recitals in the bonds will supply the defect.

11. It has never been held that the town, or other municipal corporation, could be estopped, or bound, by recitals in the bonds, except in favor of a *bona fide* holder.

In *Chambers County v. Clews*, (21 Wall., 321,) HUNT, J., said: "The statute authorizes a subscription and loan by the county, only upon the basis of a proposition in writing, *such as it prescribes*. The proposition is a necessary preliminary *without which there can be no legal action in issuing the bonds*. Where the plea avers that there was no such proposition, and avers, also, that the plaintiffs are not *bona fide* holders of the bonds without notice, a case is stated in which the validity of the bonds cannot be sustained by any holding of this court."

It would be strange if the defendants in error could rely upon recitals in the bonds to prove the performance of conditions precedent to their issue, after they had introduced in evidence a document which conclusively disproved the performance of such conditions.

But what are the recitals in these bonds? In the body of the bonds, the statute under which they purport to have been issued, is referred to by quoting its title. In the *testatum* clause, the supervisor and commissioners state that they have subscribed their names to the bonds, "pursuant to the provisions of the act aforesaid and the written assent of two-thirds of the tax-payers of said town, obtained and filed in the office of the clerk of the County of Cayuga."

It will be seen that there is no recital, or statement, in these bonds, that the written assent of two-thirds of the resident tax-payers of the town, *as appeared on the assessment roll of such town, made next previous to the time of the borrowing of the money, or as appeared upon any other assessment roll.* If facts are to be proved by recitals in the bonds, they must be fully and explicitly recited.

The tenth and eleventh assignment of error are sub-

mitted without argument on my part, upon the brief of Mr. Worden, already referred to.

See Record, page 42, (fol's 52, 53.)

IV.

His honor, the judge, erred in overruling the objection made by the counsel for the plaintiff in error, to the reading of the bonds and coupons in evidence, unless it was proved that they were executed and delivered for money borrowed.

See Record, page 42, (fol. 53.)

This point is raised by the twelfth assignment of error. Under this assignment of error I desire to submit the following propositions, viz. :

1. The statute only authorizes the issuing of bonds for money borrowed.

See Statute, sec. 1;

Starin v. The Town of Genoa, 23 N. Y., 439;

Gould v. The Town of Sterling, Ibid., 456.

2. It cannot be presumed, in favor of the defendants in error, who are not *bona fide* holders, that the bonds were issued for borrowed money.

3. The defendants in error were bound to prove the allegation in their complaint, that the supervisor and commissioners borrowed money and issued the bonds therefor.

The thirteenth assignment of error is submitted without argument on my part.

V.

His honor, the judge, erred in refusing to decide, as requested by the counsel for the defendant below, that,

upon the proofs in the case, the plaintiffs below were not entitled to recover, and in deciding that, upon the facts proved, the said plaintiffs were entitled to recover.

This ruling, and the exception to it, will be found in the record, at pages 43, 44 (fol. 58). The point is raised by the fourteenth assignment of error. It has been, in great measure, anticipated in the discussion of the second and third points (second and ninth assignments of error).

The defendants in error evidently deemed it necessary both to allege and to prove a compliance with the statute under which the bonds purport to have been issued. But they have done neither. They have shown, both by the allegations in their complaint, and by the evidence which they gave upon the trial, that there was no compliance with the statute.

From the allegations in the complaint, it appears that the written assents of the tax-payers of the town was obtained before the date of the bonds (February 26, 1853), and that the affidavit attached to such assents was to "the effect that the persons whose written assents were thereto attached and filed as aforesaid comprised two-thirds of the resident tax-payers of said town of Genoa on its assessment roll *next previous to the obtaining said written assents*." It also arpears that the bonds were not issued, nor the money borrowed, until the first day of January, 1854, after a new assessment roll must be presumed to have been completed.

If we look at the proof actually given, the case of the defendants in error is still worse; for, in addition to the point just noticed, which is not varied by the proofs, the written assent, which was given in evidence, is void on its face, because it does not name, nor in any manner designate, the railroad company whose stock should be subscribed for and whose officers should receive the money.

The design of the Legislature in requiring that a

railroad company should first be organized, and that the money should be "paid over to the president and directors of *such railroad company, * * * as may be expressed* by the written assent of two-thirds of the resident tax-payers of said town," was to enable the tax-payers to determine whether the railroad company was one organized in accordance with the act; whether its officers were fit to be trusted with the money; and whether the prospects of the company were such as to justify the investment of the money in its stock.

The design of these provisions of the statute is the same as that of the provision in the general bonding act, to which I have referred, requiring the petitioners to name the railroad company to be aided, in the petition. In *The People v. Franklin* (5 Lans., 129), it was held that the corporation named in the petition, must exist when the petition is signed. MULLIN, P. J., said: "The effect of a petition in a proper form, and properly signed, is to charge the whole property of the town with the sum named in it, and the interest thereon. The property of those who do not sign is charged with the burden, as well as that of those who do. It is due to the former that those who vote to charge them should act in good faith; that they should inform themselves of all the facts which should be considered in deciding whether the company, whose stock or bonds are to be taken, is legally organized; whether its officers are men fit to be trusted with the management of its affairs; whether the route of the road is the one most advantageous to the people; whether it will probably command such a share of the freight and travel as will make it a safe and judicious investment."

It cannot be doubted that the assent of two-thirds of the tax-payers, given in writing and filed as required by the act, was essential to the authority of the supervisor and commissioners to borrow the money and issue the bonds. It is just as essential as the petition was in

Bissell v. City of Jeffersonville (24 How., 287), and, in that case, CLIFFORD, J., said: "Unless three-fourths of the legal voters had petitioned, it is clear that the bonds were *issued without authority*, as, by the terms of the explanatory act, it could only apply to the case where the common council of a city had contracted the obligation or liabilities therein specified *upon the petition of three-fourths of the legal voters of such city;* and if no such petition had been presented, or if it was not signed by the requisite number of legal voters, the law did not authorize the common council to ratify and affirm the subscription."

The ground, on which the bonds in that case were upheld, was, that the common council of the city was, by the statute, constituted the tribunal which should determine whether the petitioners constituted three-fourths of the legal voters of the city, and that, as the bonds were issued by the common council, it must be presumed, in favor of *bona fide* holders of the bonds, that the common council had determined that the petitioners were three-fourths of the tax-payers of the city, which determination was held to be conclusive in favor of such *bona fide* holders.

This principle has been applied in a number of cases in this court. In *Kennicut v. The Supervisors* (16 Wall., 452), HUNT, J., states the result of these cases as follows: "If an election, or other fact, is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election, or the existence of that fact, is, by law, to be ascertained and declared by any judge, officer or tribunal, and that judge, officer or tribunal, on behalf of the corporation, executes or issues the bonds, with a recital that the election has been held, or that the fact exists, or has taken place, this will be sufficient evidence of the fact *to all bona fide holders of the bonds.*"

It has never been held by this court that this princi-

ple applies, except in favor of *bona fide* holders. From the intimations of Mr. Justice HUNT, in *Chambers County v. Clews* (21 Wall., 317), it is believed that this doctrine will not be applied in any case where the plaintiff does not sustain that character.

But it is submitted that this principle does not apply to this case, not only because the defendants in error are not *bona fide* holders of the bonds, but because the supervisor and commissioners were not, by law, authorized to determine whether the requisite assent, in writing, of two-thirds of the tax-payers of the town had been procured and filed in the clerk's office in accordance with the statute.

The courts have gone a great way in holding a judicial decision conclusive where the jurisdictional question was, by statute, submitted to the judge or officer, to be determined by evidence submitted to him, and where the evidence tended to prove the jurisdictional fact. But this case does not belong to that class. The *statute* has determined what the assent of the tax-payers shall contain, where it shall be filed, by whom it shall be signed, and within what time it shall be acted upon, and, in these respects, its requirements are few and simple, but positive and certain. There is no room for doubt or uncertainty. The supervisor and commissioners are prohibited from issuing the bonds unless these requirements are complied with. It is not submitted to the supervisor and commissioners to determine, upon evidence or otherwise, whether the written assent of the tax-payers is drawn in conformity with the statute. The purchaser of the bonds has the same means of ascertaining whether the requisite assent of the tax-payers has been procured and filed, as the supervisor and commissioners have.

There is nothing in the statute which warrants the inference that the Legislature intended to constitute the supervisor and assessors judges to take proof of the

signatures, or in any manner to judge of the genuineness of the signatures, to the assents; and so the Court of Appeals of the state has repeatedly determined. They might determine, and their affidavit may be sufficient to prove, that the persons whose names *purport* to be signed to the written assents, constituted two-thirds of the resident tax-payers of the town, whose names appeared on the assessment roll for the year 1852. That is all they swore to. To hold that this affidavit proves the genuineness of the signatures to the assents, is to hold that it proves what it does not state, and what the affiants never intended to make oath to. They could never have been convicted of perjury for making this affidavit by proof that the signatures were not genuine, and that they knew the fact. All they determined was a mere matter of computation.

To hold that this affidavit proves that the persons, whose names purport to be signed to the written assents, were two-thirds of the resident tax-payers of the town, named on its assessment roll for the year 1853, an assessment roll made nearly a year after the affidavit was made, is equivalent to holding that the resident tax-payers of the town, for the year 1853, must necessarily be the same persons who were the tax-payers of the town in the year 1852, and that the affidavit proves a fact, essential to the power of the supervisor and commissioners, which it does not state, and which the affiants never thought of verifying.

The case of *The Bank of Rome v. The Village of Rome* (19 N. Y., 20), will be referred to by the learned counsel for the defendants in error. That case is clearly distinguishable from the one now under consideration. In *Starin v. The Town of Genoa* (23 N. Y., 452), LOTT, J., points out that distinction in these words: "The provision of the statute under which that case was decided, * * * * is materially different from the law under consideration. That act, after conferring the

power on the village to subscribe for railroad stock and to issue bonds for the payment thereof, on obtaining an approval of the act itself by two-thirds of the electors required by the eighth section above cited, which was to be ascertained at a special election to be held and conducted at the time and in the manner directed in the ninth section, provides in that and the tenth section, that the trustees of the village, after the canvass directed to be made at such election, 'shall immediately thereafter return to the clerk of the board of trustees the aggregate number of votes taken, designating how many were for and how many against taking railroad stock' (§ 9), and that 'the president and trustees shall, within two days after the return of said trustees to the clerk, meet and proceed to canvass the votes thus certified and returned, and shall make out and file in the office of the clerk of Oneida county the certificate setting forth that this act is approved or not approved, as the case may be; and if it shall *appear from such certificate* that this act has been approved and the issue of stock authorized, the president and trustees of such village shall proceed to make subscription and to issue bonds as authorized by this act' (§ 10). It will be seen from these provisions of that act, above referred to, that the power to subscribe for the stock and issue the bonds, was to become operative and effectual on the approval of the act by the electors of the village; and that the *certificate of such approval*, duly filed in the office of the clerk of the county of Oneida, *was declared to be evidence of the fact, and fully authorized such subscription, and the issue of bonds therefor.*"

It is confidently submitted that the plaintiffs below had no right to recover upon the evidence in the cause.

VI.

His honor, the judge, erred in excluding the evidence

offered by the defendant below, to show that the bonds in suit were originally, and in the first instance, delivered to the railroad company mentioned in the pleadings, for stock, and not for money borrowed.

See Record, page 44 (Fol's 58, 59).

This point is raised by the fifteenth assignment of error.

It has been held by the Court of Appeals that such a disposition of the bonds was unauthorized and unlawful; that the officers must borrow the money and issue the bonds in payment therefor, at rates not less than par, and pay over the whole amount of money to the railroad company so as to aid the company *to the full extent of the par value of the bonds;* that the statute did not authorize such officers to exchange the bonds for an equal nominal amount of railroad stock, leaving it in the power of the company to sell the bonds *at a discount.* (*Starin v. The Town of Genoa*, 23 N. Y., 439; *Gould v. The Town of Sterling*, Ibid., 456; *The People v. Mead*, 24 Id., 114).

This case is distinguishable from *The Town of Queensbury v. Culver*, (19 Wall., 83,) and that distinction is pointed out by STRONG, J., as follows: "True, the commissioners were not at liberty to dispose of them (*i. e.*, the bonds), for less than their par value, and they did not. Had they done so, and had the plaintiff not been a holder,—without notice and for a valuable consideration,—there might have been a defense to the action. The third section, however, empowered the commissioners to 'dispose of the bonds to such persons or *corporation* as they should deem most advantageous for the town, but not for less than par.' And it required them not to pay over 'any money or *bonds*' to the railroad corporation until certain satisfactory assurances should be furnished them. Thus it appears that the delivery

of the bonds to the railroad company *was contemplated and authorized.*"

VII.

His honor, the judge, erred in excluding the evidence offered by the counsel for the defendant below, to show that Benjamin Gould, Esq., of Cayuga county, was the owner and holder of the bonds now in suit, in 1854, and continued to be the owner and holder of them until some time on or about the first day of September, 1867, when he disposed of the same, but not to the plaintiffs.

See Record, page 44 (fol. 59).

This point is raised by the sixteenth assignment of error. It is difficult to see upon what principle this evidence was excluded. The following considerations will show that it ought to have been admitted :

1. If the evidence offered had been received, it would have disproved the allegation of the defendants in error, that they purchased the bonds on the first day of January, 1857 ; and it would have proved that they did not purchase them until after the first day of September, 1867.

2. It would have shown that the defendants in error took the bonds with *twenty-five over-due and unpaid coupons attached to each bond*, and that the town had been in default, in paying the interest on the bonds, for a period of *upwards of twelve years and a half ;* and that the defendants in error knew it when they purchased the bonds, if they ever did purchase them.

3. If this is not enough to show that the bonds were *dishonored* and that the defendants in error were bound to take notice of the fact, it is difficult to conceive what would be.

That the town should have wholly omitted to pay any

interest for upwards of twelve years and a half, when the interest was payable semi-annually, and coupons for each semi-annual instalment of over-due and unpaid interest were annexed to each bond, were circumstances much more calculated to discredit the bonds in the market, and to lead any prudent business man to conclude that the town had a defense to them, than would have been the fact that the principal sum had been over-due for a short period, without any default in the payment of interest which had previously become due. (*The First National Bank v. Scott County*, 14 Minn., 77; *Newell v. Gregg*, 51 Barb., 263; *Vinton v. King*, 4 Allen, 562).

4. If the evidence offered would not have shown, as matter of law, that the defendants in error were not *bona fide* holders of the bonds and coupons, it was, at least, competent evidence for the consideration of the jury, on the issue whether they took them in good faith, and without notice of any defense.

National Bank of North America v. Kirby, 108 Mass., 497.

In the case last cited, it was held that the fact that a promissory note, the principal of which is payable in four years, with interest annually, bears no endorsement of the receipt of either of the three instalments of interest which have fallen due, does not, of itself, render the note subject, in the hands of a third person, who then took it as collateral security, to equities existing between the original parties to it, but is a circumstance for the consideration of the jury, whether he took it in good faith, and without notice of any defense.

5. If the evidence offered was not competent for the purpose of showing that the defendants in error were not *bona fide* holders of the bonds and coupons which became due and payable after the first day of September, 1867, it certainly was competent for the purpose of

showing that they were not *bona fide* holders of the coupons which matured before that time.

Arents v. Commonwealth, 18 Gratt., 750 ;
The Mayor v. Ray, 19 Wall., 468 ;
Chambers County v. Clews, 21 Id., 317.

6. The defendants in error have recovered, in this action, the amount of the coupons which became due and payable on the first day of July, 1867 ; for they fell due within six years before the commencement of the action.

7. The evidence offered, in connection with the other evidence in the case, would have defeated a recovery upon eleven coupons of thirty-five dollars each, if nothing more.

VIII.

The exception to the ruling of his honor, the judge, referred to in the seventeenth assignment of error, is well taken.

See Record, page 44, (fol's 59–61.)

The evidence offered would have shown that the defendants in error received the bonds and coupons after the highest court in the State had construed the statute, under which the bonds purport to have been issued, holding that the supervisor and commissioners had no right to exchange the bonds directly with the railroad company for an equal nominal amount of its stock, and that a party who sought to recover upon them must prove that, in point of fact, the written assent of two-thirds of the resident tax-payers of the town had been procured and filed as required by the act, and that the affidavit, annexed thereto, did not prove this fact.

This evidence would also have shown that some of

the coupons, annexed to the bonds, had been in litigation in the state courts, and that the Court of Appeals had held that the bonds were illegally issued, upon the same state of facts appearing which were offered to be proved as stated in the fifteenth assignment of error.

In such circumstances, it ought to be presumed that the bonds were transferred to the defendants in error, without consideration, and for the purpose of having them prosecuted in the federal courts.

IX.

The proofs thus offered, if they had been admitted in evidence, would have changed the burden of proof, and rendered it necessary for the defendants in error to prove that they were in fact *bona fide* holders for value of said bonds; and his honor, the judge, erred in deciding otherwise.

See Record, page 44 (fol. 61).

This point is raised by the eighteenth assignment of error.

The exception to the ruling referred to in this assignment of error is well taken:

1. The evidence offered in the fifteenth, sixteenth and seventeenth assignments of error, together with the evidence given by the defendants in error, was abundantly sufficient to show that the bonds were illegally issued and illegally transferred to the railroad company.

2. It is a well established rule of law, in relation to commercial paper, that if fraud or illegality, in the inception of a bill, note or bond, or in the circumstances under which it was taken by the person who endorsed it to the plaintiff, is proved, there arises a legal presumption that it was transferred without consideration ;

which presumption the plaintiff is bound to rebut by proof that he paid value for it.

Smith v. Sac County, 11 Wall., 139;
Hall v. Featherstone, 3 Hurls. & Nor., 284;
Smith v. Braine, 16 Q. B., 224;
Bailey v. Bidwell, 13 M. & W., 76;
Fitch v. Jones, 32 Eng. L. & E. R., 134;
Mather v. Lord Maidstone, 1 C. B. (N. S.), 273;
Harvey v. Towers, 6 Exch., 556;
Berry v. Alderman, 14 C. B., 95.

X.

His honor, the judge, erred in excluding the evidence offered by the counsel for the defendant below, to show that some of the signatures to said assents were not genuine, and that others were duplicates, and that, in point of fact, the same never were signed by two-thirds of the resident tax-payers of said town, as required by said act.

See Record, pages 44, 45 (Fol's 61, 62).

This point is raised by the nineteenth assignment of error.

This ruling seems to have been made, with hesitation, probably under the impression that the affidavit annexed to the written assents on file, is conclusive evidence that the persons whose names appear to be subscribed to such assent, were two-thirds of the resident tax-payers of said town whose names appeared on the assessment roll made next previous to the time when the money was borrowed, and that the signatures were genuine; or else, that the town was estopped from denying these facts by the recitals in the bonds. It is submitted, that neither of these positions can be sustained:

1. The affidavit annexed to the written assent on file is not conclusive evidence, nor any evidence, that the signatures of the persons whose names appear to be signed to the written assent are genuine; and so the Court of Appeals has repeatedly held.

The People v. Mead, 36 N. Y., 224;
Starin v. The Town of Genoa, 23 Id., 439;
Gould v. The Town of Sterling, Ibid., 456.

If this ruling shall be sustained, the effect will be to nullify the proviso in section one of the statute. It would be in the power of the supervisor and assessors to place upon file a paper purporting to be the assent of tax-payers, and to be signed by a certain number of tax-payers of the town, and, by annexing to the paper an affidavit of any two of them, to the effect that the persons whose names are thereto attached, comprise two-thirds of the resident tax-payers of said town on its assessment roll made next previous thereto, to bind the town, though many of the signatures to the assent were not genuine, and though the persons who had, in fact, signed the same, did not constitute two-thirds of the tax-payers of the town.

This the Legislature never intended; nor is such a construction of the statute in accordance with the general rule adopted by the courts as to the proper construction of such a proviso (*Voorhees v. the Bank of the United States*, 10 Peters, 449; *Minis v. United States*, 15 Id., 423; *Cumberland v. Magruder*, 34 Md., 381; *Mayor of Selford v. Ackers*, 16 M. & W., 85; *The People v. Solomon*, 46 Ill., 333; *Townsend v. Brown*, 4 Zabrisk, 80; *Wyman v. Southard*, 10 Wheat., 1, 30).

The evidence offered would have shown that there was no compliance at all with the proviso in the statute, and that the supervisor and commissioners had no power to borrow any money, nor to issue any bonds, under the act. It would have shown that the money was borrow-

ed, and the bonds issued, in the precise case mentioned in the proviso, which the Legislature did not intend should be *within the purview of the previous part of section one*. It would have shown that the bonds were issued without authority, and in violation of an express prohibition of the statute.

If the affidavit annexed to the written assent under this act, could, in any case, have this effect, it is submitted it could have such effect only in a case where the affidavit was made with reference to the assessment roll last completed before the time when the money was borrowed. In this case, the affidavit could have no reference to the assessment roll of 1853, which was completed before it is claimed that any money was borrowed. How, then, can the affidavit be conclusive evidence of the assent of two-thirds of the tax-payers named on the assessment roll made and completed the next year after the date of the *jurat* to such affidavit?

If the affidavit could have this effect in any case, it is submitted that it could have such effect only in a case where the plaintiff was a *bona fide* holder for value of the bonds.

2. The plaintiff in error is not estopped by the recitals in the bonds, or in the *testatum* clause to said bonds, from denying the authority of the supervisor and commissioners to issue the same.

(*a.*) The execution of the bonds is put in issue, and it was necessary for the defendants in error to prove their execution, and the authority of the supervisor and commissioners to execute them.

(*b.*) The statute did not prove the authority of the supervisor and commissioners to issue the bonds; and hence it was necessary for the defendants in error to allege and to prove the organization of the railroad company, and the written assent of two-thirds of the resident tax-payers of the town named on its assess-

ment roll made and completed next previous to the time of borrowing the money.

(*c.*) They failed in their attempt to prove the assent of the tax-payers.

The paper which they put in evidence to prove the assent of the tax-payers did not name, nor in any manner designate the Lake Ontario, Auburn and New York Railroad Company, nor did the affidavit annexed to it refer to the assessment roll of the town made next previous to the time of borrowing the money, but it did expressly refer to the assessment roll for the year 1852, which was made and completed more than a year before the money was borrowed. Thus it will be seen that the defendants in error themselves proved that the requisite assent of the tax-payers was never procured and filed in accordance with the proviso in the statute, and the plaintiff in error cannot be estopped from insisting on facts which the defendants in error have proved, and which show conclusively that the supervisor and commissioners had no authority to issue the bonds in question.

(*d.*) The doctrine of estoppel, by reason of recitals in the bonds, has never been applied to a case like this, and it has no just app'ication to such a case.

There is no corporate seal to the bonds in this case; nor is there any seal whatever impressed upon them; but they are simple contracts, if they have any validity.

All the cases, in which it has been held that the purchaser of the bonds might rely on recitals therein as to the performance of the preliminary requisites to be performed prior to their issue, are cases where the bonds were issued *under the corporate seal of the municipal corporation;* and the doctrine of estoppel had its origin in the presumptions which arise from the fact that such corporate seal was impressed on the bonds, the corporate

seal having the effect to throw the whole burden of proof upon the corporation.

The first case in this court in which this doctrine was advanced, so far as I can learn, is the case of the *Commissioners of Knox County v. Aspinwall* (21 How., 539), in which the decision was placed mainly on another ground, but the doctrine in question was laid down on the authority of the *Royal British Bank v. Turquand* (5 Ellis & Black., 248); *Same case in Error* (6 Id., 327); and *Maclae v. Southerland* (25 Eng. L. & E. R., 92, 114).

In the *Royal British Bank v. Turquand* (5 Ellis & Black., 259), Lord CAMPBELL, C. J., said: "In this case, the bond sued upon is allowed to be under the seal of the company, and to be their deed. A *prima facie* case, therefore, is made for the plaintiffs. The difficulty does not arise here, which was to be encountered in *Ridley v. Plymouth Grinding and Baking Company* (2 Exch., 711)," and other cases referred to, "where claims were made for goods sold and delivered, and the question was whether any contract had ever been entered into by the company sought to be charged. Here, the defendants, having executed the bond, and having no defense under the plea of *non est factum*, the *onus* is cast upon them of showing that the bond is unlawful and void."

In *St. Joseph Township v. Rogers* (16 Wall., 644), this doctrine was again traced to the case last above cited, and put upon the ground that the bonds were under the seal of the corporation, and that the corporation, having executed the bonds, could have no defence under the plea of *non est factum*.

It is manifest that this doctrine can have no application to a case like this; for here the plaintiff in error has denied the execution of the so-called bonds, as it had a perfect right to do, and the burden was upon the defendants in error to prove their execution, and the

authority of the supervisor and commissioners to execute them in behalf of the town. There is no corporate seal impressed upon the bonds, by proving which the burden of proof could be cast upon the town. The question is, whether any contract has been entered into by the town sought to be charged. Under the pleadings in this case, the burden of proof to establish the fact that the alleged bonds were the bonds of the town, was upon the defendants in error. They failed to prove the fact, or rather they *disproved it.*

Upon what principle, then, can the town be estopped by recitals in the bonds? To apply this doctrine, in a case like this, is to allow the supervisor and commissioners to prove their authority by their own assertions, and to preclude the town from denying it. This would be pushing the doctrine in question much further than it has ever been carried, and would render utterly useless and nugatory the proviso in the statute, requiring the written assent of two-thirds of the tax-payers to be procured and filed as a condition precedent to the power of the supervisor and commissioners. If this is the law, the defendants in error went through with a useless performance in attempting to prove the assent of the tax-payers.

I have thus far argued this question as if the defendants in error were *bona fide* holders of the bonds; but I do not wish to be understood as conceding that they are. I have endeavored to show that they are not. It has never been held by this court that the principle of estoppel applied where the plaintiff, on his own showing, received the bonds with five or six over-due and unpaid coupons annexed to them. Much less has it been held that the town might not show that the plaintiff received the bonds with twenty-five over-due and unpaid coupons, representing interest for twelve and a half years, annexed to them. Nor has this court held that a party who receives bonds thus dishonored, can claim the rights

of a *bona fide* holder. This question so far as I can learn, now comes before this court for the first time. It is an important question, and I doubt not that it will receive the serious consideration of the court.

The reasoning of the court in *National Bank of North America v. Kirby* (108 Mass., 497), is, as it seems to me, not very satisfactory. In the fore part of the opinion, importance seems to be attached to the fact that there was no proof that the plaintiff knew that the over-due interest was unpaid, except the want of an indorsement of the payment of such interest upon the note. Some importance is also attached to the fact that the plaintiff took the note as collateral security; and, therefore, accuracy was not required in ascertaining the amount due for interest. These are circumstances that distinguish that case from this. But Mr. Justice COLT goes further and says that, "In its effect upon the credit of a note it is manifest that a failure to pay interest is not to be ranked with a failure to pay principal." The reasons assigned for this distinction may be briefly stated as follows: First,—That interest is an incident to the debt. Second,—It is not subject to protest and notice to indorsers. Third,—Interest cannot be recovered on over-due interest. Fourth,—That the statute of limitations does not run against interest until the principal is due. The conclusion is arrived at, that, "The holder of a note, with interest payable annually, loses no rights against the parties to it, whether makers or endorsers, by neglecting to demand it; and he has the election to do so, or wait and collect it all with the principal."

The learned judge cites *Brooks v. Mitchell* (9 M. & W., 15), in which it was held that a promissory note, payable on demand, cannot be treated as over-due, so as to affect an indorsee with equities, merely because it is indorsed a number of years after its date, and no interest has been paid on it for several years before such

transfer. The reference to that case is unfortunate, for that case is not good law in this country, not even in Massachusetts. (*Herrick v. Wolverton*, 41 N. Y., 581; *Ranger v. Cary*, 1 Metc., 369; *American Bank v. Jenness*, 2 Id., 282; *Stevens v. Brice*, 21 Pick., 193; *Nevins v. Townsend*, 6 Conn., 5; *Cresswell's Executors v. Arrot*, 1 Serg. & R., 180).

Is it true that interest, expressly provided for in the contract, and promised to be paid semi-annually during the whole term of credit, is a mere incident of the debt? It has been held that, where there is no contract for the payment of interest, and it can only be recovered as damages for the non-payment of the principal debt when it became due, the interest is a mere incident to the debt, and that, if the party, to whom the money is payable, accepts the amount agreed to be paid in full satisfaction of the principal debt, he cannot, afterwards, maintain an action for the mere incidental damages which he has sustained by reason of the debt not being paid when it became due. But it has been held that this principle does not apply to a case where the interest is stipulated for in the contract (*Fake v. Eddy*, 15 Wend., 76; *The Southern Central Railroad Company v. The Town of Moravia*, 61 Barb., 180).

The agreement to pay interest is certainly a part of the contract, and the failure to pay it, at the time agreed upon, is a breach of the contract for which an action will lie (*The City v. Lamson*, 9 Wall., 477). It is difficult to see why a breach of the contract, by a failure to pay interest when due, and especially repeated breaches known to the purchaser of the bonds, does not dishonor them, as well as a failure to pay the principal. (*Newell v. Gregg*, 51 Barb., 263; *First National Bank v. Scott County*, 14 Minn., 77.)

The fact that interest is not subject to protest and notice to indorsers, or days of grace, cannot have much bearing upon this question.

The position that interest cannot be recovered on over-due interest, is doubtless correct in Massachusetts; and that is also the law in some other states; but it was held not to be the law by the learned judge in this case, and there is much authority in support of this ruling. The authorities on both sides of this question are collected in *Wheaton v. Pike* (9 R. I., 132). Whatever this court may hold, upon this question, it seems to me it can have no influence in determining the question whether the bonds were dishonored by the non-payment of interest for several years, represented by coupons annexed to the bonds.

The position that the statute of limitations does not run against over-due interest until the principal becomes due, cannot be sustained. The statute begins to run whenever the right of action accrues; and so the learned judge held in this case. It has been held, by this court, that the statute of limitations commences to run against actions upon coupons for interest, annexed to municipal bonds, when they have been detached from the bonds and transferred to parties other than the holders of the bonds, from the maturity of the coupons respectively (*Clark v. Iowa City*, 20 Wall., 583). It is submitted that it can make no difference whether the coupons are detached from the bonds or not; for, in either case, the interest which is stipulated for in the contract is a part of the debt, and not a mere incident to it, and that is the ground of the decision.

Mr. Justice COLT closed his opinion with these words: "But while non-payment of interest is not to be allowed the effect here claimed for it, it is still a fact proper to be considered by the jury in connection with other circumstances, on the question whether the holder is entitled to the position of one who has taken in good faith, and without actual or constructive notice of existing defenses. And, in the opinion of the court, the defendant should have been permitted to go to the jury, with

proper instructions from the court, upon the evidence reported in this case."

If the evidence offered, as stated in the sixteenth assignment of error, had been admitted, and if the plaintiff in error had been permitted to go to the jury on the question whether the defendants in error were *bona fide* purchasers of the bonds, there can be little doubt that the jury would have found they were not; for it would have appeared that there was $9,825 over–due and unpaid upon the coupons annexed to the bonds when the defendants in error received them. This, together with the fact that the defendants in error made no attempt to collect the interest until the principal became due, in 1873, would doubtless have led the jury to conclude that they were not *bona fide* holders.

XI.

It is submitted that the Circuit Court had no jurisdiction to entertain the suit or to render the judgment, for the reason that the plaintiff in error is not a citizen of the state of New York.

See Record, page 45 (fol's 62, 63). This point is raised by the twentieth assignment of error.

By article first, title 1, chapter xi of the Revised Statutes of New York (1 R. S., 337), it is enacted as follows: "§ 1. Each town, as a body corporate, has capacity,

"1. To sue and be sued, in the manner prescribed in the laws of this state:

"2. To purchase and hold lands within its own limits, and for the use of its inhabitants, subject to the power of the Legislature over such limits:

"3. To make such contracts, and to purchase and hold such personal property, as may be necessary to the exercise of its corporate or administrative powers: And,

"4. To make such orders for the disposition, regulation or use of its corporate property, as may be deemed conducive to the interests of its inhabitants.

"§ 2. No town shall possess or exercise any corporate powers, except such as are enumerated in this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or given.

"§ 3. All acts or proceedings by or against a town, in its corporate capacity, shall be in the name of such town."

By title v, article fifth, of the same chapter (1 R. S., 356, 357), it is enacted as follows:

"§ 1. Whenever any controversy or cause of action shall exist between any towns of this state, or between any town and an individual or corporation, such proceedings shall be had, either at law, or in equity, for the purpose of trying and finally settling such controversy, and the same shall be conducted in like manner, and the judgment or decree therein shall have the like effect, as in other suits or proceedings of a similar kind, between individuals and corporations.

"§ 2. In all such suits and proceedings, the town shall sue or be sued by its name, except where town officers shall be authorized by law to sue in their name of office, for the benefit of the town."

These are believed to be all the statutory provisions, enacted by the state Legislature, which are necessary to be taken into consideration in determining this question. The following propositions are submitted:

1. The several towns in the state of New York are corporations for certain specified and very limited purposes, or, to speak more accurately, they have a certain very limited corporate capacity; and so it has been held.

Lorillard v. The Town of Monroe, 11 N. Y., 392;
Morey v. The Town of Newfane, 8 Barb., 645;

The Town of Gallatin v. Loucks, 21 Id., 578;
Onderdonk v. The City of Brooklyn, 31 Id., 505;
Gailor v. Herrick, 42 Id., 79.

Towns in the State of New York have not general corporate powers. A few special powers are conferred upon them; and then they are expressly prohibited from exercising any other corporate powers.

2. The powers conferred upon towns by the above quoted statutes, are not such as to constitute them citizens of the state.

Towns are part of the machinery of the state government. The capacity "to sue and be sued, *in the manner prescribed in the laws of this state*," does not give them general capacity even to sue and be sued. They can only sue and be sued in the manner prescribed by some state law. Some effect must be given to the words "in the manner prescribed in the laws of this state." What is the import of these words? They are broad enough to include not only the cases in which, or the causes for which, they may sue or be sued, but the courts in which, and the process by which, they may sue and be sued. If this is the true interpretation, they can only sue and be sued in the state courts. Not having general corporate powers, and being authorized to sue and be sued in the manner prescribed by the state laws, they are not citizens of the state within the meaning of the constitution of the United States and the acts of Congress conferring jurisdiction upon the Circuit Courts.

I am not aware that this question has been passed upon by this court. It does not appear to have been raised in the *The Town of Queensbury v. Culver* (19 Wall., 83).

In the *Bank of the United States v. Deveaux* (5 Cranch, 61), it was held that a corporation aggregate cannot, in its corporate capacity, be a citizen. MARSHALL, C. J., said: "That invisible, intangible and artificial being,

that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union."

In *The Lafayette Ins. Co. v. French* (18 How., 404), CURTIS, J., said: "This court does not hold, that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a state within the meaning of the constitution."

It seems to be the character of the members composing the corporation, and their right to exercise their rights in their corporate name, which determines the capacity of the corporation to sue or be sued in the federal courts. The only question, then, is whether this corporation, with its limited powers, and expressly prohibited from exercising any other corporate powers, can represent the inhabitants of the town in the federal courts. If, as is said, it "cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name," and if the right of the inhabitants of the town to exercise their rights in their corporate name, is limited to the exercise thereof *in the manner prescribed in the laws of the state*, how can the corporation have any power to represent the inhabitants in the federal courts, when there is no authority conferred upon it by the state law to do so? It is submitted it cannot; that such an exercise of corporate power is not only not conferred, but is prohibited by the statute. Then the question arises, whether the Legislature of the state can create a municipal corporation with such limited and defined powers, authorizing

it to sue and to be sued, only as the Legislature shall prescribe, and by so doing deprive the federal courts of jurisdiction. Of course, if the town were created a corporation, having general corporate powers, no one would claim that the state Legislature could exclude the federal courts from jurisdiction over it as the representative of the inhabitants of the town. But it is submitted that, taking into consideration the limited powers of the towns, and the fact that they are a part of the machinery of the state government, and that its officers are concerned only in the administration of state laws, and also that the towns have not the general power to contract debts, they are not citizens of the state within the meaning of the federal constitution, nor of the acts of Congress conferring jurisdiction upon the Circuit Courts.

XII.

His honor, the judge, erred in refusing to charge the jury, as requested by the counsel for the plaintiff in error, that, on the above proofs, the plaintiffs (below) were not entitled to recover, and in charging the jury that said plaintiffs, on the above proofs, were entitled to recover the principal secured to be paid by the said several bonds, together with the interest thereon from the first day of January, 1873, to the time of the trial, together with the amounts specified in said several coupons which became due and payable within six years previous to the commencement of this suit.

See Record, page 45 (Fol's 63, 64).

This point is raised by the twenty-first assignment of error. It raises the some question raised by the four-

teenth assignment of error, and which has already been argued.

XIII.

The twenty-second assignment of error is submitted without argument on my part. It raises the question whether the defendants in error could recover interest on the coupons. (See *Ferry v. Ferry*, 2 Cush., 92; *Hastings v. Wiswall*, 8 Mass., 455; *Wilcox v. Howland*, 23 Pick., 167; *Doe v. Warren*, 7 Greenl., 48; *Bannister v. Roberts*, 35 Me., 75; *Stokely v. Thompson*, 34 Penn. St. R., 210; *Niles v. The Board &c.*, 8 Blackf., 158; *Leonard v. Administrators of Villers*, 23 Ill., 377; *Connecticut v. Jackson*, 1 Johns. Ch., 13).

It is submitted that the judgment should be reversed, and a *venire de novo* awarded.

WARREN A. WORDEN,
Attorney for Plaintiff in Error.

H. L. COMSTOCK,
Of Counsel for Plaintiff in Error.

The preceding brief is intended to apply to the following other cases, on this calendar, so far as it is applicable to them; and it is believed that it covers all the points arising in them.

THE TOWN OF VENICE,
Plaintiff in Error,
vs.
WILLIAM L. MATSON,
Defendant in Error.

THE TOWN OF VENICE,
Plaintiff in Error,
vs.
OPHER EDSON,
Defendant in Error.

THE TOWN OF VENICE,
Plaintiff in Error,
vs.
EVANDER MURDOCK,
Defendant in Error.

WARREN A. WORDEN,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

THE TOWN OF GENOA, PLAINTIFF IN ERROR.

vs.

JAMES O. WOODRUFF and DANIEL MACAULEY, DEFENDANTS IN ERROR.

No. 54.

ARGUMENT FOR DEFENDANTS IN ERROR.

D. WRIGHT, Att'y,
And of Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

THE TOWN OF GENOA, Plaintiff in Error.
vs.
JAMES O. WOODRUFF, & DANIEL MACAULEY, Defendants in Error.

No. 54.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

The pleadings in this case are substantially the same as in the case of the town of Venice plaintiff in error vs. Evander Murdock defendant in error, (No. 53), except that in this case, the complaint alleges that the bonds were purchased by the defendants in error, "to wit. on the first day of January. 1857," and the second answer in this case, denies that the plaintiff in error is a citizen, and therefore insists that the Circuit Court had no jurisdiction of the defendant, which answer was not in the case of the town of Venice plaintiff in error vs Murdock defendant in error.

The proofs on the part of the plaintiff below were substantially the same, and the objections and exceptions on behalf of the defendants below were substantially the same, except in this case, the affidavit was made by the Supervisor and all the Assessors.

The offers of proof on behalf ot the defendants below were the same, except that the ownership of the bonds was in Benjamin Gould, Esq., of Cayuga Co., instead of Slocum Howland as in the other case. (No. 53.)

In the brief filed by the Counsel for the plaintiff in error, (Mr. Comstock,) I find the following statement. "They (referring to the defendants in error) allege, that on the first day of January, 1857, they purchased the said bonds and coupons thereto attached, all of which then remained unpaid," and he follows this by the following inference, to wit :

" It follows from these allegations that at the time the defendants in error purchased said bonds and coupons, six of the coupons attached to each bond were overdue and remained unpaid, and that they knew the fact." (See the brief p. 48.)

This seems a non-sequiter when we read the alle

gations of the complaint *with reference to and in connection with the proofs made.*

When the bonds were produced in evidence, the earliest coupon which was found attached to the bonds, was that *which became due July 1st*, 1856. (Record p. 42, bottom of page.)

Hence, if the defendants in error purchased the bonds on the first day of January 1857, as is alleged in the complaint, the only coupon then past due was that which became payable July 1st, 1856, and in regard to that, no tax could have been laid for its payment until November, 1856, nor could such tax have been made available for the payment of this coupon, according to the provisions of the act, before March 1857, and therefore even this coupon was not dishonored according to the strictest term of the commercial law, on the first day of January, 1857.

See point ninth (p. 36) of the argument in the case of Venice vs. Murdock (No. 53.)

But the offer of proof made by the plaintiff in error, upon the trial, to wit: "that Benjamin Gould Esq., of Cayuga County, was the owner and holder of the bonds in 1854" &c., (see Record p. 44) would have remedied any such defect, had it existed, upon that subject, see point fourth (p. 23) of brief filed on behalf of the defendant in error in the case of Venice vs. Murdock (No. 53.)

As I am not aware of any other substantial difference between the proofs in this case and those in the case No. 53, I submit this case on behalf of the defendant in error upon my brief filed and the argument made in that case.

Auburn, N. Y., Sept. 1875.

D. WRIGHT, Att'y,
and of Counsel for Def'ts in Error.